

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

**Docket
No. 77-6072**

**In The
United States Court of Appeals**

For the Second Circuit

DONNA LEARY, et al.,

Plaintiffs-Appellants,

— v. —

HETTY JEAN CRAPSEY, et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF NEW YORK**

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

RICHARD J. ARCARA
United States Attorney for the
Western District of New York
Attorney for Appellee
233 U.S. Courthouse
Rochester, New York 14614

Of Counsel:

GERALD J. HOULIHAN
Assistant United States Attorney

ROBERT W. BATCHELDER
Acting Assistant Chief Counsel

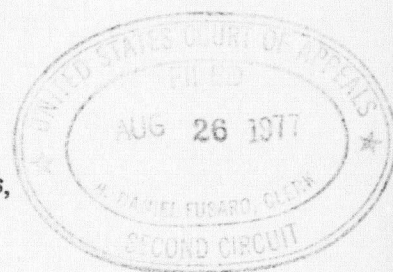
GLENN F. WASSERMAN
Attorney Advisor

Urban Mass Transportation Administration
400 7th Street, SW.
Washington, D.C. 20590

Daily Record Corporation
Rochester, New York

(S3106 - 9093)

Spaulding Law Printing
Syracuse, New York



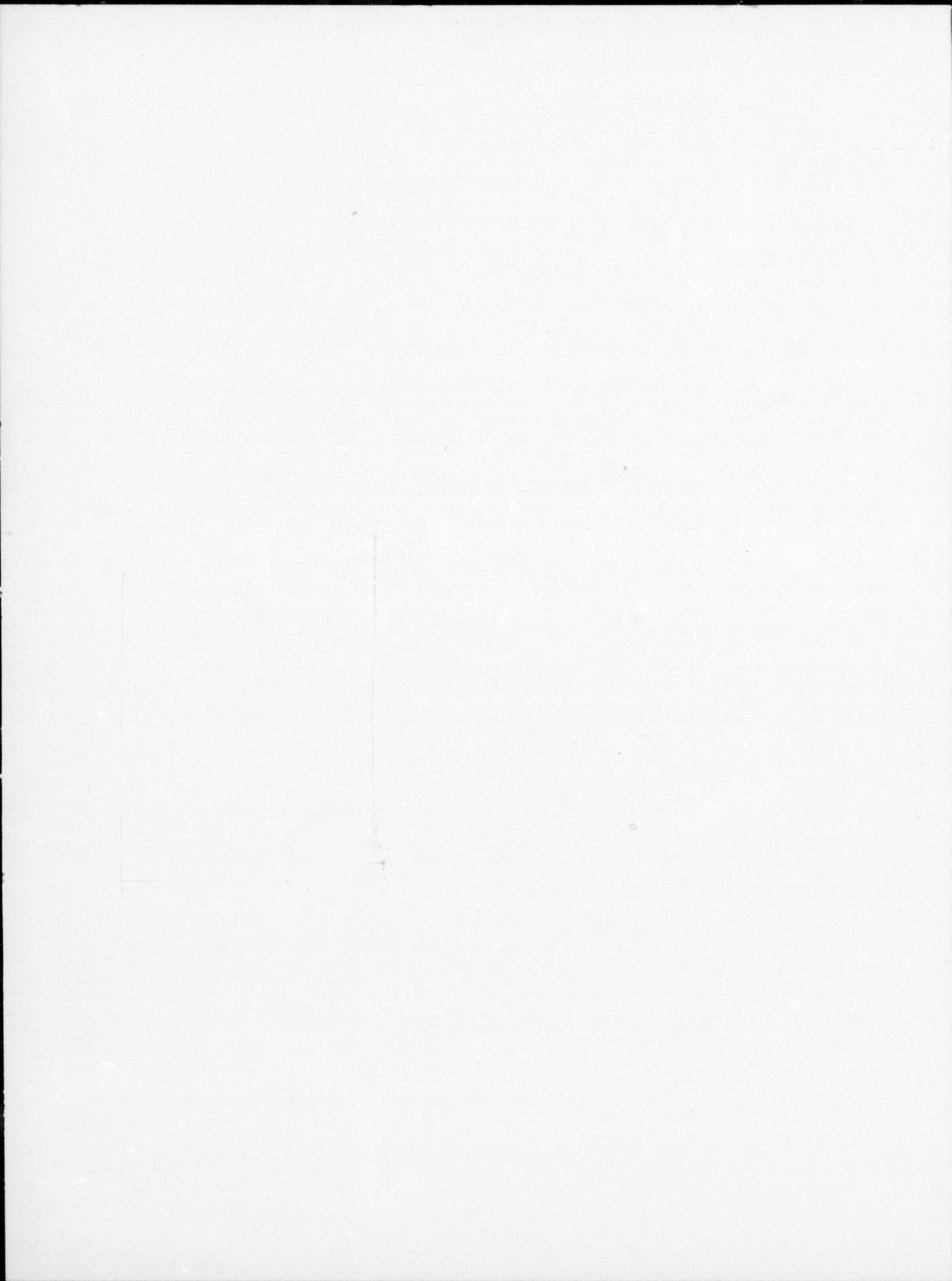


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	(i)
TABLE OF AUTHORITIES.....	(iii)
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATUTES INVOLVED.....	4
STATEMENT OF THE FACTS.....	5
ARGUMENT.....	11
1. Summary.....	11
2. Federal Defendants' Phased Program Leading To The Development Of Transit Systems That Can Be Effectively Utilized By Elderly And Handicapped Persons Is An Appropriate Response To The Requirements Of 49 U.S.C. §1612(a) And 29 U.S.C. §794.....	11
3. UMTA's Approval Of Project No. NY-03-0064 Was In Accordance With Statutory Standards.....	21
A. Judge Burke Was Correct In Finding That Local Defendants' "Special Efforts" Complied With All Statutory Requirements.....	21
B. The Approval Of A Grant For Buses Which Did Not Include Wheelchair Lifts Did Not Unlawfully Discriminate Against Non-Ambulatory Persons.....	24
4. The District Court Was Correct In Finding That Defendants Had Not Violated Plaintiffs' Rights To Equal Protection Of The Laws Under The Fifth And Fourteenth Amendments To The Constitution.....	30
5. The Scope Of Judicial Review In The Instant Action Is Strictly Limited.....	35
A. The District Court's Review Of An Approved Grant Is Limited To Determining Whether The Agency Action Was An Abuse Of Discretion.....	35
B. Judge Burke Was Correct To Limit Review To Approved Projects Only.....	37
C. Judge Burke Did Not Err By Holding That Plaintiffs' Failure To Attend A Public Hearing Bars Them From Objecting To A Project Approved More Than One Full Year Prior To The Commencement Of This Action.....	39

	Page
6. Summary Judgment For Defendants Was Appropriate In This Case.....	43
7. Remand Of This Case For Further Consideration In Light Of Recent Administrative Developments Is Unnecessary And Legally Unsound.....	48
CONCLUSION.....	51

ATTACHMENTS

- A. Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus
(May 19, 1977).
- B. United Handicapped Federation v. Andre,
No. 76-1369 (8th Cir., June 21, 1977).
- C. Vanko v. Finley, No. C76-1305 (N.D. Ohio,
June 1, 1977).
- D. Hudson Transit Lines, Inc. v. Brinegar,
Civil No. 74-648 (D. N.J., July 25, 1974).
- E. David D. Hudson v. Washington Metropolitan
Area Transit Authority, Civil Action 76-0360
(D.D.C., July 8, 1976).
- F. Snowden v. Birmingham-Jefferson County Transit
Authority, Civil Action No. CA-75-G-0330-S
(N.D. Ala., April 7, 1975).

TABLE OF AUTHORITIES

Cases

	Page
<u>Bartels v. Biernat</u> , 427 F.Supp. 226 (E.D. Wis., 1977).....	24,27,28,39,47
<u>Basista v. Weir</u> , 340 F.2d 74 (3rd Cir., 1965).....	34
<u>Camp v. Pitts</u> , 411 U.S. 138 (1972).....	43
<u>Citizens To Preserve Overton Park, Inc. v. Volpe</u> , 401 U.S. 402 (1971).....	37,47
<u>Cort v. Ash</u> , 422 U.S. 66 (1975).....	29
<u>County of Los Angeles v. Coleman</u> , 423 F.Supp. 496 (D.D.C., 1976).....	16
<u>Farage v. Williams</u> , 397 U.S. 471 (1970).....	31
<u>Fontiero v. Richardson</u> , 411 U.S. 677 (1972).....	32,33
<u>Graham v. Richardson</u> , 403 U.S. 365 (1971).....	32
<u>Hairston v. Drosick</u> , 423 F.Supp. 180 (S.D. W.Va., 1976)...	29
<u>Hempstead Bank v. Smith</u> , 540 F.2d 57 (2d Cir., 1976)...	43,45
<u>Hudson v. Washington Metropolitan Area Transit Authority</u> , Civil Action No. 76-0360 (D.D.C., July 8, 1976).....	38,39,43
<u>Hudson Transit Lines, Inc. v. Brinegar</u> , Civil No. 74-648 (D. N.J., July 25, 1974).....	38
<u>Joseph G. Moretti, Inc. v. Hoffman</u> , 526 F.2d 1311 (5th Cir., 1976).....	44,45
<u>Kampmeier v. Nyquist</u> , 553 F.2d 296 (2d Cir., 1977).....	29,32
<u>Kramer v. Union Free School District</u> , 395 U.S. 621 (1969).....	33
<u>Kuhn v. National Association of Letter Carriers</u> , 528 F.2d 767 (8th Cir., 1976).....	40
<u>Lau v. Nichols</u> , 414 U.S. 563 (1974).....	28
<u>Leefer v. Administrator, National Aeronautics and Space Administration</u> , 543 F.2d 209 (D.C. Cir., 1976).....	44
<u>Lindsey v. Normet</u> , 401 U.S. 56 (1972).....	32

	Page
<u>Lloyd v. The Illinois Regional Transportation Authority</u> , 548 F.2d 1277 (7th Cir., 1977).....	18,21,24,26,27,39,49
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967).....	32
<u>Memorial Hospital v. Maricopa County</u> , 415 U.S. 250 (1974).....	31
<u>Mitchell v. National Broadcasting Co.</u> , 553 F.2d 265 (2d Cir., 1977).....	48
<u>Mourning v. Family Publications Service, Inc.</u> , 411 U.S. 356 (1972).....	34
<u>National Broadcasting Co. v. United States</u> , 319 U.S. 190 (1943).....	34
<u>National Nutritional Foods Ass'n. v. Weinberger</u> , 512 F.2d 688 (2d Cir., 1975).....	43
<u>Northwestern Co. v. F.P.C.</u> , 321 U.S. 119 (1944).....	34
<u>Oyama v. California</u> , 332 U.S. 633 (1948).....	32
<u>Phelps Dodge Corp. v. N.L.R.B.</u> , 313 U.S. 177 (1940).....	36
<u>Pullman, Inc. v. Volpe</u> , 337 F.Supp. 432 (E.D. Pa., 1971).....	13,35
<u>San Antonio School District v. Rodriguez</u> , 411 U.S. 1 (1972).....	32,33
<u>Snowden v. Birmingham-Jefferson County Transit Authority</u> 407 F.Supp. 394 (N.D. Ala., 1975); <u>aff'd per curiam</u> , 551 F.2d 862 (5th Cir., 1977); <u>rehearing denied</u> , May 31, 1977.....	13,14,21,23,24,28,41,42
<u>Stringer v. Dilger</u> , 313 F.2d 536 (10th Cir., 1963).....	34
<u>Udall v. Tallman</u> , 380 U.S. 1 (1964).....	36
<u>United Handicapped Federation v. Andre</u> , 409 F.Supp. 1297 (D. Minn., 1976); <u>vacated</u> , No. 76-1396 (8th Cir., June 21, 1977).....	14,19,20,23,24,28,47,48,49,50,51
<u>United States v. Classic</u> , 313 U.S. 299 (1941).....	34
<u>Urban Contractors Alliance of St. Louis v. Bi-State Development Agency</u> , 531 F.2d 877 (8th Cir., 1976).....	40
<u>Vanko v. Finley</u> , Civil No. 76-1305 (N.D. Ohio, June 1, 1977).....	19,20,21,22,24,25,29,30

	Page
<u>Webb v. Miami Valley Regional Transit Authority, Civil</u> <u>Action No. C3-75-67 (S.D. Ohio, January 18, 1976)</u>	28
<u>Young v. Coleman, Civil No. H-76-201 (D. Conn.,</u> <u>December 17, 1976); appeal docketed sub nom, Young v. Adams,</u> <u>No. 77-6056 (2d Cir., January 11, 1977)</u>	15,21,24,28,47

STATUTES

	Page
Administrative Procedure Act	
5 U.S.C. §701 <u>et seq.</u>	11, 37, 38, 39
Civil Rights Act of 1871	
42 U.S.C. §1983.....	2, 34
Civil Rights Act of 1964	
42 U.S.C. §601.....	28
Department of Transportation and Related Agencies Appropriations Act of 1975, §315	
Pub.L. 93-391.....	2
Federal-Aid To Highways Act of 1973, §165(b)	
23 U.S.C. §142 note.....	15
Federal Rules of Civil Procedure	
Rule 12(b).....	3
Rule 56(c).....	3, 45
Rehabilitation Act of 1973	
29 U.S.C. §701, <u>et seq.</u>	2, 25, 26
29 U.S.C. §794.....	4, 10, 11, 12, 13, 15, 20, 25 26, 27, 29, 30, 34, 35, 47
Urban Mass Transportation Act of 1964, As Amended	
49 U.S.C. §1601, <u>et seq.</u>	2
49 U.S.C. §1601a.....	12
49 U.S.C. §1602.....	2, 5, 7, 39, 40
49 U.S.C. §1604.....	2, 23
49 U.S.C. §1605.....	19
49 U.S.C. §1612.....	4, 11, 12, 13, 14, 15 20, 22, 29, 34, 35, 47

REGULATIONS

	Page
49 CFR §§1.48-1.51.....	5,15
33 Fed. Reg. 6965 (June 30, 1968) (Reorganization Plan No. 2).....	5
40 Fed. Reg. 42975 (September 17, 1975) (Transportation Improvement Program).....	16
41 Fed. Reg. 17871 (April 29, 1976) (Executive Order 11914).....	10
41 Fed. Reg. 18234, <u>et seq.</u> (April 30, 1976) (Transportation For Elderly And Handicapped Persons).....	8,15,16,17,18,19,20,23,51
23 CFR Part 450.....	8
49 CFR Part 609.....	8,17
49 CFR Part 613.....	8,16
41 Fed. Reg. 27283 (July 1, 1976) (Apportionment Of Capital And Operating Assistance Funds).....	23
41 Fed. Reg. 32286 (August 2, 1976) (UMTA Policy Statement On Transbus).....	9
41 Fed. Reg. 45842 (October 18, 1976) (Completion Of Transit Bus Requirements).....	15
42 Fed. Reg. 9654 (February 16, 1977) (Amendments To Transit Bus Requirements).....	15
42 Fed. Reg. 22676, <u>et seq.</u> (May 4, 1977) (Nondiscrimination On Basis Of Handicap).....	10,29
42 Fed. Reg. 32264 (June 24, 1977) (Implementation Of Executive Order 11914, Proposed Rules).....	10

MISCELLANEOUS

Page

123 Cong. Rec. S 10560 (July ed., June 23, 1977).....29

Sen. Rep. No. 318, 93rd Cong., 1st Sess. (July 16, 1973)..25

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

I. STATEMENT OF THE ISSUES

1. Was the District Court correct in ruling that the defendants' efforts to accommodate the needs of handicapped persons were legally sufficient under applicable statutory and constitutional provisions?
2. Was the District Court correct in ruling that it was without jurisdiction to review pending applications for federal financial assistance prior to the taking of final agency action on such applications?
3. Was the District Court correct in ruling that plaintiffs were barred from objecting to an approved grant of federal financial assistance by the doctrine of laches?
4. Was it proper for the District Court to grant defendants' motions for summary judgment in this case?

II. STATEMENT OF THE CASE

On July 2, 1976, plaintiffs, physically handicapped residents of Monroe County, New York and an unincorporated association, brought this civil class action for declaratory and injunctive relief and monetary damages in the United States District Court for the Western District of New York (Burke, District Judge). They sued the Commissioners of the Rochester-Genesee Regional Transportation Authority ("RGRTA") and the resident manager of the Regional Transit Service, Inc. ("RTS"), which is RGRTA's subsidiary operating corporation (hereinafter referred to as "local defendants"), as well as the Secretary of

the United States Department of Transportation and the Administrator of the Urban Mass Transportation Administration ("UMTA") (hereinafter referred to as "federal defendants").

The complaint alleged violations of the Urban Mass Transportation Act of 1964, as amended, 1/ (the "UMT Act"), section 504 of the Rehabilitation Act of 1973, 2/ section 315 of the Department of Transportation and Related Agencies Appropriations Act of 1975, 3/ the Civil Rights Act of 1871, 4/ and the due process and equal protection clauses of the fifth and fourteenth amendments to the Constitution of the United States. The various statutory and constitutional violations were alleged to occur by reason of defendants' purported failure to provide a federally assisted mass transportation system effectively accessible to the physically handicapped. Specifically, plaintiffs claimed that federal defendants' approval of grants of financial assistance to local defendants under section 3 and 5 of the UMT Act 5/ for the purchase of new buses to be used in mass transportation service where most of the buses would not be accessible to all physically handicapped persons was violative of the applicable statutes and constitutional provisions.

1/ 49 U.S.C. § 1601 et seq.

2/ 29 U.S.C. § 794.

3/ Pub. L. 93-391 (August 28, 1974); 88 Stat. 781.

4/ 42 U.S.C. § 1983.

5/ 49 U.S.C. §§ 1602, 1604.

On July 29, 1976, local defendants moved to adjourn a deposition and for an enlargement of time to respond to plaintiffs' "Notice to Take Deposition" which contained a request to produce documents, on the grounds that such discovery would be wasteful, burdensome and oppressive in light of defendants' motions to dismiss or, in the alternative, for summary judgment which would be filed with the Court on the next regular motion day of the Court, September 13, 1976. On July 29, 1976, Judge Burke ordered that all such discovery be suspended pending disposition of defendants' motions.

On August 31, 1976, local defendants moved to dismiss the action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56(c). On September 13, 1976, federal defendants filed their motions to dismiss, or alternatively, for summary judgment. Both motions were supported by legal memoranda and affidavits. Plaintiffs responded by a legal memorandum and affidavit. Argument on the motions was heard by Judge Burke on September 13, 1976.

On March 31, 1977, following the submission of supplementary memoranda and affidavits, the Court issued a ruling granting defendants' motions for summary judgment and dismissing the action in its entirety. On April 1, 1977, a judgment consistent with that ruling was entered. Thereafter, on April 25, 1977, plaintiffs filed a notice of appeal.

III. STATUTES INVOLVED

A. Urban Mass Transportation Act of 1964 as amended

PLANNING AND DESIGN OF MASS TRANSPORTATION FACILITIES TO MEET SPECIAL NEEDS OF THE ELDERLY AND THE HANDICAPPED.

SECTION 16. (a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services: that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy. (49 U.S.C. §1612).

B. Rehabilitation Act of 1973

NONDISCRIMINATION UNDER FEDERAL GRANTS

Section 504. No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (29 U.S.C. § 794).

IV. STATEMENT OF THE FACTS

The program of federal assistance to urban mass transportation systems, authorized by the UMT Act, is administered by the Department of Transportation pursuant to Reorganization Plan No. 2 of 1968. 6/ All of the powers of the Secretary of Transportation under the UMT Act and related statutes have been delegated to the UMTA Administrator. 7/

In April 1974, local defendants submitted an application to UMTA for capital assistance under section 3 of the UMT Act 8/ to upgrade transit bus service in the Rochester area by replacing older buses with new ones. The application 9/ described a program of replacing 23 buses per year for five years, for a total of 115 new buses. 10/ Thereafter, on February 11, 1975 the UMTA Administrator approved Project No.

6/ 33 Fed. Reg. 6965 (June 30, 1968); 82 Stat. 1369.

7/ 49 CFR § 1.50.

8/ 49 U.S.C. § 1602.

9/ The application at issue, designated Project No. NY-03-0064, is contained in the Appendix as Exhibit "A" to the Affidavit of Howard Gates. References to the Appendix herein will be referred to by the pagination of the Appendix. See application [A50-69].

10/ Application, [A53].

NY-03-0064 in the amount of \$2,495,560 11/ for the purchase of 27 new 49-passenger suburban buses and 19 new standard size (45-53 passenger) transit buses. 12/ These 46 new buses were to constitute the first year's project of a four-year program to provide a total of 115 replacement buses, as noted above.

Specifications for the 19 new standard size buses 13/ included a kneeling device to lower the front step four to six inches to facilitate boarding and alighting. In addition, all of the buses approved for purchase under Project No. NY-03-0064 were equipped with the following special features and equipment designed to assist ambulatory elderly and handicapped passengers:

- Non-skid surfaces on aisles and stepwells;
- Vertical stanchions from floor to ceiling at aisle rear corner of entrance stepwell, aisle front and rear corners of exit stepwell, and aisle rear of driver's seat;
- Vertical stanchion at front corner of exit stepwell, adjacent to body side from front side of stepwell to door header;
- Sloping grab rails on both entrance doors and at front edge of exit stepwell;
- Special lights in entrance and exit stepwells to illuminate stepwell and adjacent curb area; and
- Power assisted exit door interlocked to accelerator and brakes to prevent bus from moving when elderly or handicapped passenger is alighting, 14/

11/ The estimated net project cost was \$3,119,450, of which the federal grant would cover 80%. See Approval Memorandum of February 7, 1975 [A190].

12/ Id., [A192].

13/ The specifications were approved in by UMTA in March, 1975. See Affidavit of Howard [A43] para. 36 [A43].

14/ Affidavit of Charles [A185].

The memorandum recommending that the Administrator approve the project noted the foregoing special features for the elderly and handicapped, and additionally noted the following:

"The Regional Transit Service, Inc. also provides special off-peak reduced fare for senior citizens and a demand responsive service at present limited to a demonstration area. The RTS plans to expand the dial-a-bus concept service in the near future." 15/

The "Project Findings and Determinations" document accompanying the Approval Memorandum further indicates that in accordance with section 3(d) of the UMT Act, 16/ the local defendants had afforded an adequate opportunity for public hearings following adequate prior notice and had held such hearings. 17/ In fact, following notice in the Rochester Democrat and Chronicle on March 14, March 21 and April 4, 1974, a public hearing on the project was held on April 15, 1974. 18/ Plaintiffs admit that neither they nor anyone representing their interests participated in the public hearing. 19/

In addition to Project No. NY-03-0064, local defendants had submitted two other applications, Nos. NY-03-0064-02 and NY-05-0003, to UMTA. 20/ These projects, if approved, would provide assistance to local defendants for the purchase of a total of 23 new standard size buses and 5 small buses for operation in demand-responsive service for the elderly and handicapped. 21/

15/ Approval Memorandum of February 7, 1975 [A192].

16/ 49 U.S.C. § 1602(d).

17/ Approval Memorandum of February 7, 1975 [A193].

18/ [A198-203].

19/ Appellants' Brief at 26.

20/ Affidavit of Howard Gates, paras. 43-49 [A45-47].

21/ Id.

However, at the time plaintiffs' complaint was filed, and at the time Judge Burke issued his opinion neither project had yet received final UMTA approval. 22/

Subsequent to the approval of Project No. NY-03-0064, but prior to the filing of plaintiffs' complaint, UMTA published in the Federal Register of April 30, 1976, final regulations concerning "Transportation for Elderly and Handicapped Persons". 23/ These regulations set forth comprehensive planning requirements, service requirements and equipment standards designed to make regular transit service more accessible to ambulatory elderly and handicapped passengers, and to increase significantly the level of service for wheelchair users and others who cannot negotiate steps.

The regulations were clearly meant to be prospective in effect. Thus, the criteria set forth at 49 CFR § 613.204 for UMTA approvals of grant applications apply only to "mass transportation capital...projects approved on or after May 31, 1976...". 24/ Similarly, the bus equipment requirements were made applicable to "all new transit buses exceeding 22 feet for which an UMTA grantee issues, on or after May 31, 1976...a formal procurement solicitation". 25/

22/ In fact, at the time this Brief was prepared, neither project had yet been approved.

23/ 41 Fed. Reg. 18234 et seq. (April 30, 1976), adding 49 CFR § 613.204 and an appendix thereto, an appendix to 23 CFR Part 450, and 49 CFR Part 609.

24/ 41 Fed. Reg. 18237 (April 30, 1976).

25/ 49 CFR § 609.15, 41 Fed. Reg. 18240 (April 30, 1976). The regulations also provided that UMTA would concur in bus specifications only if they included a bus design permitting the addition of a wheelchair accessibility option which local transit officials could order. The effective date of this

On August 2, 1976, following a public hearing, UMTA published in the Federal Register a Policy Statement on Transbus, announcing, inter alia, that after February 15, 1977 manufacturers would have to offer optional equipment making regular transit buses accessible to wheelchair users, (i.e., a lift or ramp). 26/ The Policy Statement also set forth and explained then Administrator Patricelli's decision not to mandate "Transbus", an experimental bus featuring a very low floor and ramp, accessible to wheelchair users. 27/

On September 21, 1976, also prior to Judge Burke's decision, all three major American bus manufacturers submitted bids to the Southern California Rapid Transit District for the production of 200 lift-equipped standard-size transit buses to be purchased with federal assistance. 28/ Prior to this, however, no manufacturer in the United States had ever submitted a bid for the production of such buses; and no manufacturer had produced such buses. 29/

25/ (Cont.) requirement was left open pending a public hearing. 49 CFR § 609.15(b).

26/ 41 Fed. Reg. 32286 (August 2, 1976). The requirements announced in the August 2, 1976 Policy Statement were added to the regulations by amendment published in the Federal Register on October 18, 1976. 41 Fed. Reg. 45842 (October 18, 1976). While the Policy Statement also mandated floor and step height requirements for buses, these requirements were subsequently postponed. See 42 Fed. Reg. 9654 (February 16, 1977).

27/ See also discussion infra at p. 19-20 .

28/ Affidavit of Marianne Artusio [A208].

29/ Affidavit of Charles F. Bingman, para. 16 [A188].

On May 4, 1977, pursuant to Executive Order 11914, 30/ the Secretary of Health, Education and Welfare (HEW) published final regulations implementing section 504 of the Rehabilitation Act of 1973, entitled "Nondiscrimination on Basis of Handicap". 31/ These regulations apply only to programs administered by HEW. However, in accordance with Executive Order 11914, the regulations stated that guidelines for other Government agencies (which would include UMTA) would be promulgated promptly. 32/

On May 19, 1977, Secretary of Transportation Adams announced a major policy change by mandating "Transbus". 33/ The effect of the announcement was to require that all transit bus procurements issued for bid after September 30, 1977 must conform to "Transbus" specifications, e.g., a stationary floor height of not more than 18 inches (with the use of a "kneeling feature"), and the provision of a ramp for boarding and exiting. In the interim, the regulations described above would remain effective.

30/ 41 Fed. Reg. 17871 (April 29, 1976).

31/ 42 Fed. Reg. 22676, et seq. (May 4, 1977).

32/ 42 Fed. Reg. at 22677. In fact, proposed guidelines have been issued and appear at 42 Fed. Reg. 32264 et seq. (June 24, 1977).

33/ The document announcing and explaining Secretary Adams' decision is attached to this Brief as Attachment "A".

V. ARGUMENT

1. Summary

Plaintiffs mischaracterize federal defendants' position with respect to the issue of whether the relevant statutes create rights which give rise to a private cause of action. 32/ Federal defendants contend that the District Court was correct in holding that the efforts made by defendants satisfied all applicable statutory and constitutional requirements. Moreover, we contend that the District Court did not err in holding that until UMTA takes final action on pending applications there is no final agency action within the meaning of the Administrative Procedure Act ("APA") and thus no jurisdiction for the Court to review such proposed projects. We further contend that Judge Burke was correct in applying the doctrine of laches where plaintiffs failed to participate in a public hearing held pursuant to statute after appropriate notice had been given. Finally, we contend that there was no error in granting defendants' motions for summary judgment under the circumstances of the instant action.

2. Federal Defendants' Phased Program Leading To The Development Of Transit Systems That Can Be Effectively Utilized By Elderly And Handicapped Persons Is An Appropriate Response To The Requirements Of 49 U.S.C. § 1612(a) And 29 U.S.C. § 794.

At issue in this case is the propriety of a federal grant of assistance to the local defendants for the purchase of 46 new transit buses. 33/ In order to place this grant in its

32/ Appellants' Brief at pp. 5, 8, 15. Federal defendants agree that the statutes at issue herein confer a private right of action upon plaintiffs.

33/ Complaint, paras. 20-25 [A15].

proper context it is necessary to review briefly the steps UMTA has taken to implement section 16(a) of the UMT Act and section 504 of the Rehabilitation Act.

UMTA interprets the two statutes at issue to require the orderly development of transit services which elderly and handicapped persons can effectively use and which are reasonable by comparison with the services provided to the general public. UMTA is pursuing this goal by a two-pronged effort. First, UMTA requires applicants for capital or operating assistance to demonstrate a good-faith commitment to planning for the needs of the elderly and handicapped and to implementing those plans within a reasonable time. Second, UMTA funds studies, experimental programs and demonstrations to develop technologies and strategies which local transit bodies will be able to use in meeting the needs of the elderly and handicapped.

This is the heart of a step-by-step process that will lead to transit systems becoming vastly more accessible to elderly and handicapped persons within a reasonable time. While UMTA provides financial and technological leadership, the initiative for planning and implementing specific services for the elderly and handicapped will and should come from local communities. This is in accord with the mandate of the UMT Act, which states at 49 U.S.C. § 1601a:

"It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance to exercise the initiative

necessary to satisfy its urban mass transportation requirements." 34/

Plaintiffs primarily attack the first prong of UMTA's effort. UMTA has not demanded that every application for a grant of assistance contain significant features to benefit the elderly and handicapped. 35/ However, UMTA has required applicants to exhibit "special efforts" in planning for the needs of the elderly and handicapped, sufficient to assure that progress is being made to develop services that the elderly and handicapped can effectively use.

Prior to May 31, 1976, the effective date of UMTA's elderly and handicapped regulations, the standard for what constituted "special efforts" was flexible and determined on a case-by-case basis. A number of courts considered what this "special efforts" standard required. In Snowden v. Birmingham Jefferson County Transit Authority, 36/ for example, the plaintiffs sought to enjoin a capital grant for the purchase of a number of buses and related equipment and facilities, alleging violations of section 16(a) of the UMT Act, section 504 of the Rehabilitation Act and the equal protection clause of the Constitution. The District Court specifically noted that the

34/ See also Pullman, Inc. v. Volpe, 337 F. Supp. 432, 438-439 (E.D. Pa., 1971).

35/ Section 16(a) of the UMT Act requires that "all Federal programs offering assistance in the field of mass transportation...should contain provisions implementing this policy." (emphasis added). It does not require that all grants should contain such provisions.

36/ 407 F. Supp. 394 (N.D. Ala., 1975); Aff'd per curiam, 551 F.2d 862 (5th Cir., 1977); rehearing denied, May 31, 1977.

buses ordered would have special equipment such as stanchions, grab-rails, step-well lighting, power-assisted doors, etc., to aid ambulatory elderly and handicapped passengers. The Court also took note of the ongoing UMTA research project known as "Transbus", designed to develop a new generation of buses accessible to the non-ambulatory handicapped. The court concluded that these efforts fulfilled the "special efforts" requirement of section 16(a) of the UMT Act. 37/

In another case, United Handicapped Federation v. Andre, 38/ the grant of assistance at issue included the purchase of 309 standard-size transit buses that were not equipped to transport wheelchair users and ten vans that were so equipped. Judge Alsop found that ten specially equipped buses and the special features included in the regular buses were sufficient "special efforts." 39/ The Court also noted UMTA's research and planning efforts, including the "Transbus" program, and concluded that section 16(a) of the UMT Act had not been violated. 40/

37/ 407 F. Supp. at 396-397.

38/ 409 F. Supp. 1297 (D. Minn., 1976); vacated, No. 76-1396 (8th Cir., June 21, 1977). As will be discussed, infra, although the grant of summary judgment by the District Court in Andre was vacated by the Court of Appeals, the lower court's decision was found to have been justified by the record before that court. (See slip opinion at p. 7, Attachment "B" to this Brief). It was only the subsequent promulgation of regulations by UMTA that prompted the Court of Appeals to remand the action for further proceedings.

39/ 409 F. Supp. at 1300.

40/ Id. at 1299. Both Snowden and Andre noted that wheelchair accessible buses were not then commercially available. Subsequent to those decisions buses equipped with lifts did become available. See discussion, supra, at p.9. This fact does not vitiate the rationale of either Snowden or Andre, since neither of those decisions required adoption of all technologically feasible alternatives, but merely

The "special efforts" standard was clarified by UMTA's regulations concerning transportation services for elderly and handicapped persons. 41/ These regulations were authorized by section 16 of the UMT Act, section 165(b) of the Federal-Aid Highway Act of 1973, section 504 of the Rehabilitation Act of 1973, and the delegations of authority by the Secretary of Transportation to the UMTA Administrator at 49 CFR §§ 1.48 and 1.51. Their purpose is to implement the statutes relied upon by plaintiffs herein. To do so, the regulations set forth detailed planning requirements, service requirements and equipment standards designed to make regular transit service more accessible to ambulatory elderly and handicapped persons, and to increase significantly the level of service for wheelchair users and others who cannot negotiate steps. 42/

40/ (Cont.) "special efforts" to aid the elderly and handicapped See also Young v. Coleman, Civil No. H-76-201 (D. Conn., December 17, 1976); appeal docketed sub nom, Young v. Adams, No. 77-6056 (2d Cir., January 11, 1977).

41/ 41 Fed. Reg. 18234 et seq. (April 30, 1976); as amended by 41 Fed. Reg. 45842 (October 18, 1976) and 42 Fed. Reg. 9654 (February 16, 1977). Hereinafter referred to as "elderly and handicapped regulations."

42/ As will be discussed, infra, the regulations remain in effect until buses having "Transbus" specifications become available. Once "Transbus" is available, regular transit service will be accessible to wheelchair users and others who cannot now use standard transit buses. It is anticipated that the elderly and handicapped regulations will be amended shortly to incorporate Secretary Adams' decision to mandate "Transbus."

The first step in the regulations is a planning process that will lead to coordinated programs for assisting ambulatory and non-ambulatory elderly and handicapped persons. In accordance with UMTA's overall planning requirements, 43/ an "annual element" of the Transportation Improvement Program containing projects for which the local transit authority will seek assistance during a given year must be submitted to UMTA. 44/ The elderly and handicapped regulations, at 49 CFR § 613.204(b) require that annual elements submitted after September 30, 1976, must contain projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semiambulatory capabilities. Specific examples of the level of effort that must be demonstrated in the annual element to satisfy the "special efforts" standard are illustrated in an Appendix to 49 CFR Part 613. 45/ Finally, to insure that progress is being made, 49 CFR § 613.204(c) conditions project approvals after September 30, 1977 upon a demonstration that reasonable progress has taken place in implementing previously programmed projects.

43/ See 23 CFR Part 450 (40 Fed. Reg. 42975 et seq., September 17, 1975).

44/ A useful description of UMTA's Transportation Improvement Program regulations is found in County of Los Angeles v. Coleman, 423 F. Supp. 496 (D.D.C., 1976).

45/ 41 Fed. Reg. 18234.

This planning process allows maximum flexibility in deciding what services will best meet the needs of the elderly and handicapped in a given community, while ensuring that progress is indeed made. By setting out examples of appropriate levels of effort, UMTA leaves it to local officials to decide whether to utilize accessible fixed route services (lift-equipped buses), or separate services for the elderly and handicapped.

The planning element of the regulations is combined with equipment standards for standard-size buses that significantly improve regular service for ambulatory elderly and handicapped persons. 46/

Moreover, the regulations require that manufacturers must offer as an option a wheelchair accessibility package which local transit officials may order, consisting of a level-change mechanism (lift or ramp), sufficient doorway and passageway clearances and at least one wheelchair securement device. 47/ To date, the only commercially available wheelchair accessibility device is a mechanical lift. 48/ Hence, the regulations make it possible for local officials to offer either accessible regular service or special services (e.g., vans, taxi, etc.) to provide for the transportation needs of the elderly and handicapped.

46/ 49 CFR § 609.15. Among other features, interior handrails, stanchions, non-skid floors, better lighting and destination signs, and priority seating are required on all new transit buses for which an UMTA grantee issues procurement solicitations after May 31, 1976.

47/ 49 CFR § 609.15(b); effective February 15, 1977.

48/ See Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus, pp. 6, 11. Attachment "A" to this Brief.

The regulations thus provide direction for reaching UMTA's goal of increased accessibility, while at the same time setting a legal standard for sufficient "special efforts" on the part of applicants seeking project approval after May 31, 1976. Courts which have considered the regulations have all implicitly assumed that the regulatory requirements set the standard for post-May 31, 1976 grants.

The United States Court of Appeals for the Seventh Circuit in Lloyd v. The Illinois Regional Transportation Authority 49/ analyzed the regulations at length and stated that "they do suggest a commitment to an affirmative remedial program of substantial scope." 50/ Since the District Court in that case had not reviewed the special efforts made by the defendants, the Court of Appeals remanded to determine whether defendants were in compliance with the regulations. 51/ The Lloyd plaintiffs did not challenge any particular grant. However, the Court of Appeals noted that since the elderly and handicapped regulations became effective on May 31, 1976, the District Court should, on remand, consider "post-May 31 allegations." 52/

49/ 548 F.2d 1277 (7th Cir., 1977).

50/ 548 F.2d at 1283.

51/ 548 F.2d at 1287. Plaintiffs sued only the local transit officials, but federal defendants have been joined in the amended complaint on remand.

52/ 548 F.2d at 1287, n.30.

Similarly, the District Court in Vanko v. Finley, 53/ in considering a July 28, 1976 application for grant assistance, requested supplemental briefs on the issue of whether the local transit system was meeting the requirements of the regulations. 54/

The second prong of UMTA's effort to move toward integration of elderly and handicapped persons into the nation's transit systems involves research, development and demonstration programs. An example of this type of effort is the "PERT" (Personal Transit) Dial-A-Ride Service instituted in Monroe County by defendants in 1973. 55/ This project provides demand-responsive service to the elderly and handicapped in smaller vehicles, some of which are lift-equipped. All such projects, while benefitting the community in which they operate, are designed to serve as models for potential nationwide application. 56/

A very significant UMTA effort in this area is the development of "Transbus". Following a sustained period of design and testing of "Transbus" prototypes, Secretary Adams on May 19, 1977 announced that all transit bus procurements issued for bid

53/ Civil No. 76-1305 (N.D. Ohio, June 1, 1977) Slip opinion attached to this Brief as Attachment "C".

54/ Id., at p. 11 generally and at Footnote 7. The Court of Appeals in United Handicapped Federation v. Andre, supra, (Attachment "B" to this Brief), also implicitly accepted the validity of the regulations as an appropriate standard for determining "special efforts". Slip Opinion at pp. 5-7.

55/ Affidavit of Howard W. Gates, paras. 18-22 [A38-40].

56/ See 49 U.S.C. § 1605.

after September 30, 1979 will be required to conform to "Transbus" specifications. These specifications include an effective floor height of not more than 18 inches (after use of a "kneeling feature"), and a ramp for boarding and exiting. The combination of low floor and ramp was determined to be the best means of providing access to standard-size buses for wheelchair users as well as ambulatory and semiambulatory passengers. 57/

It is significant that notwithstanding the fact that Secretary Adams' "Transbus" mandate represented a major reversal of the former administration's policies, it nevertheless endorsed the regulations, discussed above, by providing for their continuation during the period before "Transbus" is introduced. Thus, all manufacturers are required to offer optional equipment (e.g., lifts) for accommodating wheelchair users, and all transit operators must either purchase accessible buses or provide special services in accordance with the regulations. 58/

In summary, UMTA's efforts to implement section 16(a) of the UMT Act and section 504 of the Rehabilitation Act represent a dynamic process of imposing steadily stricter requirements on local communities to plan and implement transit services that elderly and handicapped persons can effectively use. 59/

57/ See, generally, Attachment "A".

58/ Attachment "A", at pp. 10-11. See also United Handicapped Federation v. Andre, *supra*; Attachment "B", slip opinion at p.8, n.11.

59/ Supporting this approach, the District Court in Vanko v. Finley, *supra*, declared:

"Congress' mandate that mass transit systems undertake 'special efforts' for the elderly and handicapped is therefore a dynamic, rather than a static, requirement, the specific contours of which can only be defined by the state of mass transportation technology at any particular

These efforts represent a carefully drawn balance between the need for federal enforcement of these beneficial statutes and the need to permit local communities to be the primary planners and initiators of mass transit services. Furthermore, they recognize the need to maintain and advance existing transit service for the general public while special attention is being given to the needs of those who cannot, in the interim, utilize such service. 60/ It is in this context that the grant challenged here should be examined. 61/

3. UMTA's Approval Of Project No. NY-03-0064 Was In Accordance With Statutory Standards.

- A. Judge Burke Was Correct In Finding That Local Defendants' "Special Efforts" Complied With All Statutory Requirements.

UMTA approved the complained of grant on February 11, 1975, well before the May 31, 1976 effective date of the regulations discussed above. Hence, the appropriate standard to review the grant approval is the flexible "special efforts" standard enunciated by the courts in Snowden and other early cases. It is clear that the stricter standards set forth in the regulations do not

59/ (Cont.) moment." Attachment "C", slip opinion at p.8, Fn. 3.

60/ It is significant that Senator Harrison Williams, the principal author of much legislation in this area, recognized that the "Transbus" mandate combined with the existing regulations "will finally achieve the full intent of section 16 of the Urban Mass Transportation Act." See 123 Cong. Rec. S10560, 10562 (daily ed., June 23, 1977).

61/ Plaintiffs discuss at length the legislative history of section 16 of the UMT Act for the proposition that "Congress intended that buses must be designed so that they are accessible to the mobility handicapped." (Appellants' Brief at p. 15). This argument has been rejected by every court that has reviewed the issue. See: Snowden v. Birmingham-Jefferson County Transit Authority, supra; Lloyd v. The Illinois Regional Transportation Authority, supra; Young v. Coleman, supra. Recently, the District Court in

apply. Judge Burke apparently followed this approach, and found that "R-GRTA's and RTS' efforts have fully complied with all requirements of the [UMT] Act." 62/

The record bears this out. The 'special efforts' being made by the local defendants at the time the grant was approved were summarized in The Memorandum from UMTA Associate Administrator Premo recommending approval to then Administrator Herringer:

"Regional Transit Service, Inc. has aggressively sought to provide solutions to the transportation problems of the elderly and handicapped citizens of Rochester and Monroe County. In particular they have provided for special considerations of the needs of the elderly and handicapped in the procurement of equipment. Examples of those amenities are stanchions and grab rails not normally specified in procurements as well as alterations of steps designed to ease entry and exit of transit vehicles by elderly or handicapped persons. The Regional Transit Service, Inc. also provides special off-peak reduced fare for senior citizens and a demand responsive service at present limited to a demonstration area. The RTS plans to expand the dial-a-bus concept service in the near future. Although not totally dedicated to the elderly and handicapped, this service does provide them with a further instrument of mobility previously not enjoyed." 63/

61/ (Cont.) Vanko v. Finley, supra, held:

"[T]he court specifically rejects plaintiff's contention that this statutory provision requires that 'all transit rolling stock and facilities [must be able to be] effectively utilized by all mobile disabled and elderly people.'" Attachment "C", slip opinion at p. 7.

The Vanko court noted that the legislative history of section 16(a) is not inconsistent with that court's interpretation of the statute:

"an interpretation of 'special efforts' that requires integration of many of the nation's mobility handicapped into mass transit systems at once, and eventual integration of wheelchair users into these systems when technology permits." Attachment "C", slip opinion at p. 8, n.3.

62/ Slip opinion at p.4.

63/ Approval Memorandum of February 7, 1975 [A191-192].

Such "special efforts" compare favorably to those found to be sufficient in Snowden, 64/ Andre, 65/ and other pre-regulation cases. The record also discloses that planning for the elderly and handicapped was underway. The Transportation Improvement Program, dated January 22, 1976, 66/ indicates that local defendants had programmed projects for the expansion of the "PERT" fleet 67/ in each fiscal year between 1976 and 1980. Indeed, while the regulations did not apply to this Transportation Improvement Program, the dollar amounts given for the purchase of buses to be used in demand-responsive service are sufficient to satisfy one of the illustrated examples of a sufficient level of effort to meet the regulations' "special efforts" requirement. 68/

Therefore, Judge Burke had ample grounds to find that the local defendants had made "special efforts" in compliance with the statutes at issue.

64/ See 407 F. Supp. at 396.

65/ See 409 F. Supp. at 1300.

66/ Transportation Improvement Program [A 109].

67/ See discussion, *supra*. at p. 19.

68/ See 41 Fed. Reg. 18234 (April 30, 1976). One example concerns the expenditure of an annual dollar amount for elderly and handicapped services equivalent to five percent of the section 5 apportionment for the urbanized area. This refers to the amount available to an area for assistance under section 5 of the UMT Act (49 U.S.C. § 1604), which is determined according to a formula based on population and population density. The section 5 apportionment for Rochester in fiscal year 1976 was \$2,509,090, and for fiscal year 1977 it was \$3,261,642. See 41 Fed. Reg. 27283 (July 1, 1976). Thus, by merely computing the capital expenditures programmed for those years, it can be demonstrated that local defendants satisfied the "special efforts" requirement. See Transportation Improvement Program [A 109].

B. The Approval Of A Grant For Buses Which Did Not Include Wheelchair Lifts Did Not Unlawfully Discriminate Against Non-ambulatory Persons.

Plaintiffs' complaint is based, in part, upon the fact that none of the 46 buses purchased with the funds under Project No. NY-03-0064 were accessible to wheelchair users. 69/ In fact, plaintiffs' claim that the technological capability of manufacturing standard-size transit buses is material to the case, 70/ could only be relevant if there were a legal obligation to purchase accessible buses. We contend that Judge Burke was correct in holding that "none of the statutes or constitutional provisions upon which plaintiffs rely require every federally assisted transit bus to be fully accessible to the mobility handicapped." 71/

There is no question that lift-equipped buses are commercially available today. 72/ Yet, it is equally clear that notwithstanding the present availability of such buses there is no statutory obligation to purchase them. 73/ Hence, it certainly cannot be said that UMTA erred in approving a grant for buses without lifts, especially when lift-equipped buses were not then commercially available.

The thrust of plaintiffs' argument in this regard is that the funding of a bus system lacking wheelchair accessible

69/ Complaint, para. 24 [A 15].

70/ Appellants' Brief at p. 35.

71/ Slip opinion at p. 4.

72/ See discussion, *supra*, at p. 9, and footnote 40, *supra*.

73/ See: *Snowden v. Birmingham-Jefferson County Transit Authority*, *supra*; *United Handicapped Federation v. Andre*, *supra*; *Young v. Coleman*, *supra*; *Lloyd v. The Illinois Regional Transportation Authority*, *supra*; *Bartels v. Biernat*, 427 F. Supp. 226 (E.D. Wis., 1977); and *Vanko v. Finley*, *supra*.

equipment violates the rights of handicapped persons who are confined to wheelchairs, in contravention of section 504 of the Rehabilitation Act. Section 504 does not, however, mandate equal access to all transit vehicles by all handicapped persons. This is clear from a reading of 29 U.S.C. § 792(c)(1)(A); which is also a part of the 1973 Rehabilitation Act:

"The [Transportation Barriers Compliance Board] shall also...determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems..." (Emphasis added).

The District Court in Vanko v. Finley stated the following with respect to this statute:

"The court agrees with the defendants that this provision is evidence that Congress did not intend the Rehabilitation Act to require that all handicapped individuals be fully integrated into main-stream mass transit systems." 74/

The true purpose of section 504 was expressed by the Senate Committee on Labor and Public Welfare, to which The Rehabilitation Act of 1973 was referred:

"The bill further includes a provision proclaiming a policy of non-discrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." (Emphasis added). 75/

This broad policy is being implemented by UMTA through the administrative policies, regulations and research efforts described previously. This broad-based program is in accord with Section 1 of The Rehabilitation Act, which provides:

74/ Supra, Attachment "C" to this Brief, slip opinion at p. 13, n. 11.

75/ Sen. Rep. No. 318, 93rd Cong., 1st Sess. (July 16, 1973).

"The purpose of this chapter is to provide a statutory basis for The Rehabilitation Services Administration, and to authorize programs to...

* * *

(11) evaluate existing approaches to architectural and transportation barriers confronting handicapped individuals, develop new such approaches, enforce statutory and regulatory standards and requirements regarding barrier free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals." (Emphasis added).

Thus, a reading of the entire Act shows that Congress was fully aware of the magnitude and complexity of the problem being addressed. While Congress clearly intended that positive steps be taken toward reducing the barriers which prevent handicapped persons from using public transportation facilities, Congress did not intend to prohibit the use of Federal funds in every project which includes transit equipment that is inaccessible to a certain class of handicapped persons.

Judge Burke held that "there is no violation of any federal statutory or constitutional provision." ^{76/} We agree, and believe that the record supports this holding with respect to section 504 of the Rehabilitation Act. Moreover, the cases relied upon by plaintiffs with respect to section 504 do not in any way diminish the validity of Judge Burke's holding. ^{77/}

The United States Court of Appeals for the Seventh Circuit in Lloyd v. The Illinois Regional Transportation Authority, supra, considered only the question of whether section 504 creates rights which can be enforced by a private cause of action. This narrow

^{76/} Slip opinion at p. 5.

^{77/} Plaintiffs argue that section 504 confers a private right of action on mobility-handicapped persons. (Appellant's Brief, pp. 5-14). Federal defendants have never argued to

focus came about because the District Court had dismissed the case without reaching the question whether appropriate affirmative steps had been taken to meet the needs of the elderly and handicapped. Subsequent to the District Court dismissal, UMTA promulgated its elderly and handicapped regulations. The Court of Appeals held that "section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed." 78/ The Court of Appeals thus remanded the case to the District Court to determine whether defendants are in compliance with the elderly and handicapped regulations. 79/

Lloyd is distinguishable for a number of reasons. First, the Lloyd plaintiffs did not challenge a specific project as did plaintiffs herein. Second, the District Court in Lloyd did not reach the "special efforts" question, as did Judge Burke below, which made a remand appropriate. Third, the District Court in Lloyd decided the case prior to the promulgation of the elderly and handicapped regulations. 80/ Judge Burke, on the other hand, was fully briefed on those regulations when he decided the instant case.

Bartel v. Biernat, supra, also relied upon by plaintiffs, is the only case filed by elderly and handicapped plaintiffs

77/ (Contrary to the contrary, and Judge Burke did not hold section 504 to be unenforceable. Rather, federal defendants contend that whatever rights are created by section 504 have not been violated herein. Likewise, Judge Burke found no violation to have occurred.

78/ 548 F.2d at 1281. (Emphasis added).

79/ 548 F.2d at 1287.

80/ The Court of Appeals in Lloyd noted that the District Court should not be faulted for its decision to dismiss. "Without

against the federal defendants where a court has found insufficient efforts to meet the statutory standards. 81/ Unlike the instant case, the local defendants in Bartels could not show that adequate planning for the elderly and handicapped was underway. 82/

It is difficult to see what relevance Lau v. Nichols 83/ has to this case. To the extent that it is offered for the proposition that remedial efforts in the area of discrimination must meet agency guidelines, (the Lau Court relied upon HEW guidelines to find that a school district must offer special language education to non-English-speaking students), federal defendants have no quarrel with it. However, we reiterate that at the time the project at issue herein was approved, there were no guidelines or regulations in effect. The "special efforts" found by the Administrator and recognized by the District

80/ (Cont.) the benefit of any regulations it is difficult to perceive what relief could have been afforded at that stage." Id. See also United Handicapped Federation v. Andre, supra, Attachment "B", Slip opinion at p. 7, where the Eighth Circuit Court of Appeals stated: "On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result." (emphasis added).

81/ However, "special efforts" have been found in the following cases: Snowden v. Birmingham-Jefferson County Transit Authority, supra; Webb v. Miami Valley Regional Transit Authority, Civil Action No. C-3-75-67 (S.D. Ohio, January 19, 1976); United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn., 1975); reversed on other grounds, No. 76-1369 (8th Cir., June 21, 1977); Young, v. Coleman, supra.

82/ See footnote 68, supra.

83/ 414 U.S. 563 (1974). Lau concerned section 601 of the Civil Rights Act of 1964.

Court satisfied local defendants' obligations under all applicable statutes.

Likewise, this Court's decision in Kampmeier v. Nugust 84/ adds little to plaintiffs' claims. In that case this Court affirmed the decision by Judge Burke denying a preliminary injunction to handicapped plaintiffs claiming that public school officials refused to permit them to participate in contact sports, allegedly in violation of section 504. To the extent that Kampmeier is offered for the proposition that section 504 can give rise to enforceable rights, and that handicapped plaintiffs have standing to bring a private cause of action to enforce those rights, we agree. But Kampmeier cannot be said to support plaintiffs' contention that Judge Burke erred in this case by finding no impermissible discrimination against the plaintiffs. 85/

We therefore contend that absent regulations implementing section 504, 86/ the same standard of "special efforts" applicable to section 16(a) of the UMT Act applies to section

84/ 553 F.2d 296 (2d Cir., 1977).

85/ Likewise, Cort v. Ash, 422 U.S. 66 (1975), Hairston v. Drosick, 423 F. Supp. 180 (S.D. W. Va., 1976) and other cases cited by plaintiffs (Appellants' Brief at p. 7) are useful only to establish that section 504 gives rise to rights enforceable by a private cause of action. Judge Burke did not, in this case, dispute that proposition; and neither do federal defendants.

86/ Plaintiffs rely on the regulations recently issued by the Secretary of HEW to implement section 504. 42 Fed. Reg. 22676 et seq. (May 4, 1977). Those regulations clearly apply only to HEW programs. See: 45 CFR § 84.2, 42 Fed. Reg. 22676; Vanko v. Finley, supra, Attachment "C", Slip opinion at 13, n. 10.

504 of the Rehabilitation Act, 87/ Judge Burke applied that standard, found such efforts to have been made, and ruled that section 504 had not been violated.

4. The District Court Was Correct In Finding That Defendants Had Not Violated Plaintiffs' Rights To Equal Protection Of The Laws Under The Fifth And Fourteenth Amendments To The Constitution Of The United States.

Plaintiffs claim that they are being deprived of equal protection of the laws by reason of defendants' alleged denial to them of the use of the public transportation system. At the outset, it should be noted that the acts alleged to constitute discrimination involve judgments as to the best means of assuring the greatest degree of accessibility to mass transportation services for elderly and handicapped persons. There is no indication of an active policy by any of the defendants of barring plaintiffs or anyone else from federally assisted transit buses. In fact, the "special efforts" made by defendants, and recognized by the District Court, represent a policy of making mass transportation more readily available to all physically handicapped persons. 88/ Federal defendants thus contend that there has been no discrimination against handicapped persons in the instant case.

87/ See Vanko v. Finley, supra, Attachment "C", Slip opinion at p. 13.

88/ In Vanko v. Finley, supra, the District Court held that "These constitutional provisions are held to add nothing to the plaintiff's cause of action. The mandate of 'special efforts' imposed upon defendants by statute is a higher standard than any which these constitutional provisions might require." Attachment "C", Slip opinion at 15.

Assuming, arguendo, that defendants' acts or alleged omissions did "discriminate" against plaintiffs, plaintiffs still fail to show any constitutional violation. Unless it can be demonstrated that plaintiffs have been subjected to invidious discrimination in the exercise of a fundamental right, or discrimination resulting from a suspect classification, the Constitution simply requires a rational basis for any discrimination that does exist. The Supreme Court made this clear in Dandridge v. Williams, 89/ when it held as follows:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific.' Metropolitan Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 356 U.S. 420, 426."

Plaintiffs cannot credibly maintain that they have been subjected to invidious discrimination in the exercise of a fundamental right. The Supreme Court has never held that the right to travel intrastate, or the right to utilize metropolitan mass transportation systems, is fundamental. 90/ More importantly, those cases which discuss the right to travel interstate do not require the government to provide anyone the means to engage in such travel. On a related matter, the Supreme

89/ 397 U.S. 471, 485 (1970).

90/ See Memorial Hospital v. Maricopa County, 415 U.S. 250, 254-255 (1974).

Court in Lindsey v. Normet, 91/ stated;

"We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality... . Absent constitutional mandate, the assurances of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions." (emphasis added).

Hence, while we agree that the ability to utilize mass transportation services is important, we do not agree that it is a fundamental right. As the Supreme Court stated, in San Antonio School District v. Rodriguez 92/:

"But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."

Similarly, plaintiffs cannot credibly maintain that classification based on physical handicap is suspect. 93/ Recognized "suspect" statuses are race, 94/ alienage, 95 national origin, 96/ and, arguably, sex. 97/ Classifications based upon such suspect criteria must be subjected to strict judicial scrutiny, where the classification must represent the

91/ 401 U.S. 56, 74 (1972).

92/ 411 U.S. 1, 30 (1972).

93/ In Kampmeier v. Nyquist, *supra*, this Court did not reach the question whether handicapped individuals are a suspect class.

94/ Loving v. Virginia, 388 U.S. 1, 11 (1967).

95/ Graham v. Richardson, 403 U.S. 365, 372 (1971).

96/ Oyama v. California, 332 U.S. 633, 644-646 (1948).

97/ Frontiero v. Richardson, 411 U.S. 677, 682 (1972).

only means possible to attain a compelling State interest, 98/

The Supreme Court has never declared physical handicap to be a suspect criterion. On the contrary, in Frontiero v. Richardson, supra, 99/ it was specifically noted that physical disability is not a suspect classification:

"And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that sex characteristic frequently bears no relation to ability to perform or contribute to society." (emphasis added).

Federal defendants submit that the Supreme Court in San Antonio School District v. Rodriguez, supra, set forth appropriate guidelines for consideration of cases such as that at bar. There, the Court found that the financing of local education presents a "myriad of intractable economic, social, and even philosophical problems." 100/ Hence:

"In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."

So, too, in the instant case, there is the need for flexibility in determining the most effective means of providing transportation services for the handicapped. The comprehensive plan arrived at by defendants is indeed rationally related

98/ See Kramer v. Union Free School District, 395 U.S. 621, 627-628 (1969).

99/ 411 U.S. at 686.

100/ 411 U.S. at 42.

to the legitimate goal of providing transportation services to everyone, as required by the statutes discussed previously. The means adopted to accommodate the elderly and handicapped thus meet the traditional equal protection test. Plaintiffs might prefer some other means, but there has been no violation of their constitutionally protected rights. As the Supreme Court has stated:

"That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 101/

We therefore submit that inasmuch as the means chosen by defendants to accomplish the statutory goals set forth in 49 U.S.C. § 1612(a) and 29 U.S.C. § 504 have a rational basis, there has been no violation of plaintiffs' rights under the United States Constitution. 102/

101/ Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371-372 (1972); See also: Northwestern Co. v. F.P.C., 321 U.S. 119, 124 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1943).

102/ Plaintiffs also rely upon 42 U.S.C. § 1983 as authority for maintaining this action. Jurisdiction pursuant to this statute requires that the plaintiff be subjected to a deprivation of some right, privilege or immunity secured by the Constitution and laws of the United States. See: United States v. Classic, 313 U.S. 299 (1941); Basista v. Weir, 340 F. 2d 74 (3rd Cir., 1965); Stringer v. Dilger, 313 F.2d 536 (10th Cir., 1963). Finding no violation of any federal statutory or constitutional provision, Judge Burke held that "There is no violation of the Civil Rights Act." (Slip opinion at p.5).

5. The Scope of Judicial Review In the Instant Action Is Strictly Limited.

A. The District Court's Review of An Approved Grant Is Limited to Determining Whether the Agency Action Was An Abuse of Discretion.

This case falls within the familiar category of challenges to administrative action brought by parties seeking to press their particular solutions to the resolution of complex public issues. The issues herein concern the most effective means for implementing the will of Congress expressed in section 16(a) of the UMT Act and section 504 of the Rehabilitation Act. As the implementation of these statutes involves difficult policy choices and complex technical judgments, courts should be very reluctant to second-guess the decisions of the agencies given implementation responsibility by Congress.

The importance of judicial deference to the expertise of administrative agencies in this area has often been noted by the courts. In Pullman, Inc. v. Volpe, 103/ a controversy involving an UMTA grant, the District Court stated the case against substituting judicial judgment for that of an agency vested with the decisional responsibility:

"The issues which plaintiff urges upon the court are the type that require expertise in the areas of transit planning and construction.

103/ 337 F. Supp. 432, 439 (E.D. Pa., 1971).

Congress, in UMTA, provided for grant-in-aid channeled through an agency with expertise in transportation matters to local authorities which were charged with the formulation and execution of the transportation plans. This statutory scheme, therefore, involved two bodies which were equipped to make decisions of the type challenged in this case. A court does not have the expertise to make a knowledgeable decision on such matters."

The case against substitution of judicial judgment is particularly strong where the issues involve the proper remedy to reach broadly worded policies such as those stated in the statutes relied upon by plaintiffs. In upholding an interpretation of the National Labor Relations Act by the National Labor Relations Board, the Supreme Court stated in Phelps Dodge Corp. v. N.L.R.B. 104/:

"Because the relation of remedy to policy -- -- is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

The Supreme Court has also said:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 105/

104/ 313 U.S. 177,194 (1940).

105/ Udall v. Tallman, 380 U.S. 1,16 (1964).

In the terms of the Administrative Procedure Act, a court's review of a grant such as the one here at issue is limited to determining whether the decision (e.g., the approval of the grant) was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 106/ Under this standard of review the court should engage in a substantial inquiry into the facts to consider whether the challenged action was based on consideration of the relevant factors and whether there has been a clear error of judgment. In this inquiry, "the standard of review is narrow. The court is not empowered to substitute its judgment for that of the agency." 107/

The record shows that Judge Burke had before him sufficient facts to make such a "substantial inquiry." His finding that the approval of Project No. NY-03-0064 was in conformity with all relevant statutes shows that there was no abuse of discretion by defendants.

B. Judge Burke Was Correct To Limit Review To Approved Projects Only.

In addition to Project No. NY-03-0064, there are two other projects at issue in this case, neither of which has yet been approved by federal defendants. 108/ Plaintiffs contend that the District Court erred when it held that review of UMTA

106/ 5 U.S.C. § 706(2)(A), (B), (C) and (D). Neither the "substantial evidence" standard of 5 U.S.C. § 706 (2)(E) nor a trial de novo under 5 U.S.C. § 706 (2)(F) are appropriate to the instant action. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

107/ Citizens to Preserve Overton Park v Volpe, supra, 401 U.S. at 416.

108/ See discussion, supra, at p. 7.

grants must await approval of such grants. 109/ We contend that Judge Burke did not err by so holding. In at least two other cases, federal district courts have held that section 10(c) of the Administrative Procedure Act 110/ makes review of applications for UMTA assistance premature. Section 10(c) provides as follows:

"Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." (Emphasis added).

In Hudson Transit Lines v. Brinegar, 111/ the application at issue was for a proposed acquisition of a private bus company by the State of New Jersey. The District Court held that it was empowered to review grants of assistance under the UMT Act, but that "such review must await the final decision of the Secretary." 112/

Similarly, in Hudson v. Washington Metropolitan Area Transit Authority, 113/ the plaintiff sought to prevent federal defendants from making a capital grant to a local transit authority. Judge Richey noted as follows:

109/ Slip opinion at p.3.

110/ 5 U.S.C. § 704.

111/ Civil No. 74-648 (D.N.J., July 25, 1974). Unpublished Opinion attached to this Brief as Attachment "D".

112/ Id., Attachment "D", slip opinion at p.4.

113/ Civil Action 76-0360 (D.D.C., July 8, 1976). Unpublished Memorandum Opinion attached to this Brief as Attachment "E".

"...[N]o final decision has been reached on the application for a grant loan to WMATA. Absent such a decision, the action of the agency cannot be said to be 'final' and thus not reviewable. 5 U.S.C. § 704." 114/

Thus, Judge Burke was entirely in accord with the Administrative Procedure Act and prevailing judicial decisions, by ruling that review of applications for UMTA assistance would be premature. 115/

C. Judge Burke Did Not Err By Holding That Plaintiffs' Failure To Attend A Public Hearing Bars Them From Objecting To A Project Approved More Than One Full Year Prior To The Commencement of This Action.

While not central to the disposition of this case, plaintiffs' failure to attend the public hearing on Project No. NY-03-0064, which was held pursuant to 49 U.S.C. § 1602(d) after adequate public notice, and their commencement of this action more than a year after the project was approved and the buses delivered to local defendants, 116/ was properly held to bar them from objecting to that project. 117/

114/ Attachment "E", slip opinion at p.4.

115/ Plaintiffs completely misconstrue the "primary jurisdiction" holdings in Lloyd and Bartels, supra. (See Appellants' Brief at p. 31). In those cases defendants sought to have the courts defer judgment until administrative regulations had been finalized pursuant to Executive Order 11914. In Lloyd, the Court of Appeals held that absent regulations providing for pre-judicial review procedures, the doctrine of primary jurisdiction does not apply. 584 F. 2d at 1287. Federal defendants do not here contend that the doctrine applies.

116/ See Affidavit of Howard W. Gates, paras. 34-41 [A 43044].

117/ In other contexts, it has been held that an appellate court may forego reaching the question of the propriety of the district court's disposition of a case, but reach substantially the same result for other reasons. See:

Section 3(d) of the UMT Act 118/ requires that each grant application for a project under section 3 which will substantially affect a community or its mass transportation service shall include a certification that the applicant:

has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing...

With respect to notice for this hearing, section 3(d) provides as follows:

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

As the record shows, a hearing was held by RTS on the original project, April 15, 1974, after proper legal notice in newspapers of general circulation in the Rochester area. 119/ Each of the published notices contained the following specific reference concerning mass transportation for the elderly and handicapped:

117/ (Cont.) Urban Contractors Alliance of St. Louis v. Bi-State Development Agency, 531 F. 2d 877, 880 (8th Cir., 1976); Kuhn v. National Association of Letter Carriers, 528 F. 2d 767, at 770, n. 4 (8th Cir., 1976).

118/ 49 U.S.C. § 1602(d).

119/ [A 198-203].

"E. Elderly and Handicapped:

The project will take into consideration the special needs of the elderly and physically handicapped persons. Step risers shall be covered to eliminate any overhanging step tread and additional diagonal grab rails will be installed." 120/

The project as approved was considerably smaller than the one described in the public hearing notices; the Administrator only approved the acquisition of 46 transit buses under Project No. NY-03-0064 instead of 115 set out in the notices. 121/ Thus, the importance to plaintiffs of appearing at this hearing was even greater than if the notices merely described the project as approved. However, despite timely notice of this hearing and despite the specific reference in the notices of features for the elderly and handicapped, neither plaintiffs nor anyone representing their interests appeared. 122/

Plaintiffs claim that "it can hardly be seriously asserted by defendants that participation in a public hearing constitutes an administrative prerequisite to the plaintiffs' assertion of their claims," 123/ Yet, as least two United States District Courts other than the Court below have so held in circumstances identical to those of the instant case.

In Snowden v. Birmingham-Jefferson County Transit Authority, supra, Judge Guin of the United States District Court for the Northern District of Alabama held that plaintiffs' failure to

120/ [A 198].

121/ Id.

122/ See Appellants' Brief at p. 26.

123/ Id.

appear at a public hearing on a similar project barred plaintiffs' motion for preliminary relief. 124/ In Snowden, buses acquired under an urban mass transportation grant were in production and scheduled for delivery within a short time of the filing of the complaint. Plaintiff, a wheelchair-bound resident of Birmingham, sought to enjoin acquisition of transit buses which were inaccessible to her. Judge Guin in denying temporary and preliminary relief stated:

"The evidence produced at the hearing showed that a public hearing was held after adequate notice on the subject of the purchase of the transit buses which the plaintiff seeks to enjoin. The plaintiff was, at that time, a resident of the City of Birmingham and, after adequate notice by publication, failed to attend the public hearing or make objection to the purchase which she now seeks to enjoin. The defendant, Birmingham-Jefferson County Transit Authority, expects delivery of the buses purchased beginning the end of April, 1975. Thus, plaintiff's complaint and motions for preliminary relief were not timely filed, and such relief is barred by the plaintiff's delay." 125/

If the court in Snowden found the plaintiff's failure to attend the public hearing adequate grounds to bar her complaint, then here, where the project buses were already delivered to local defendants when the complaint was filed, failure to appear must likewise bar the complaint. 126/

124/ The Court's unreported order denying plaintiffs' motion for preliminary relief is Attached to this Brief as Attachment "F".

125/ Id. Slip opinion at pp. 2-3.

126/ In Snowden, the buses had not been delivered to the transit authority at the time the complaint was filed.

Moreover, plaintiffs' contention that the public hearing and notice requirements of 49 U.S.C. § 1602(d) are inadequate to protect their interests has been specifically rejected by the District Court in Hudson v. Washington Metropolitan Area Transit Authority, supra. There, the Court held that "what is 'adequate prior notice' has been defined in the statute and the regulations relating to public hearings on an application for a grant loan under the Urban Mass Transportation Assistance Act." 127/

Thus, Judge Burke did not err in finding that plaintiffs' complaint was barred by plaintiffs' failure to attend the public hearing and their untimely filing, and plaintiffs have not cited any relevant authority to the contrary.

6. Summary Judgment For Defendants Was Appropriate In This Case

In cases such as that at bar, where the appropriate standard for review is whether the Administrator's action in approving the grant was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 128/ "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 129/ Thus, Judge Burke properly based his decision on the information contained in the application for assistance, the approval memorandum, and the other documents

127/ Attachment "E", slip opinion at p.4.

128/ See footnote 106, supra.

129/ Camp v. Pitts, 411 U.S. 138, 142 (1972); Hempstead Bank v. Smith, 540 F. 2d 57, 60 (2d Cir., 1976); National Nutritional Foods Ass'n. v. Weinberger, 512 F. 2d 688, 701 (2d Cir., 1975).

contained in the administrative record relied upon by the Administrator when the project was approved.

It is well recognized that in such situations a reviewing court may deny plaintiffs the opportunity to conduct discovery proceedings. In Leefer v. Administrator, National Aeronautics and Space Administration, 130/ the United States Court of Appeals for the District of Columbia Circuit sustained the lower court's ruling staying discovery pending the disposition of the Government defendant's motion to dismiss in a case concerning the propriety of an administrative decision by the Civil Service Commission ("CSC"). The Court of Appeals stated the following:

"Discovery could have served a useful purpose only in the event and to the extent that de novo review of CSC's decision was in order, something which [Plaintiff's] effort to obtain discovery seemingly assumed... ." 131/

A district court's denial of discovery was likewise upheld in Joseph G. Moretti, Inc. v. Hoffman, 132/ where the Court of Appeals for the Fifth Circuit stated the following:

"In Gables by the Sea, Inc., v. Lee, S.D. Fla. 1973, 365 F. Supp. 826, aff'd. per curiam, 5 Cir. 1974, 498 F. 2d 1340, the plaintiff sought to conduct extensive discovery proceedings to show that the Corps [of Engineers] improperly denied his application for a dredge and fill permit. The discovery was denied on the basis that the action was a challenge, pursuant to the

130/ 543 F. 2d 209 (D.C. Cir., 1976).

131/ 543 F. 2d at 214, n.5.

132/ 526 F. 2d 1311 (5th Cir., 1976).

Administrative Procedure Act, to a final agency decision which must be reviewed only on the administrative record. 'Information extraneous to the record should not be considered in the review procedure. If the agency action is found to be improper, the matter should be remanded to the agency; it would be improper to conduct de novo proceedings in the form of a trial by the district court to consider extra-record information' ..."133/

Hence, plaintiffs incorrectly state that summary judgment was improper in this case by reason of Judge Burke's denying them the opportunity to conduct "pre-trial discovery."134/ Such a request for discovery mistakenly assumes that the Administrator's judgment may be questioned in a de novo hearing in the district court.135/

Additionally, we submit that the record in this case is complete, that there are no material facts in dispute, and that the only issues before the District Court were issues of law which were properly disposed of by summary judgment, as provided by Rule 56 of the Federal Rules of Civil Procedure.136/

The main issue in this case is the scope of defendants' legal obligation to provide transportation services to the elderly and handicapped in the Rochester urbanized area. Plaintiffs claim that federal defendants, by funding a system that was inaccessible to some physically handicapped persons,

133/ 526 F. 2d at 1312.

134/ Appellants' Brief at 36.

135/ See Hempstead Bank v. Smith, supra, 540 F. 2d at 60.

136/ It is clear that Judge Burke relied on matters outside the pleadings and thus treated defendants' motions as motions for summary judgment rather than as motions for dismissal.

did not meet their statutory and constitutional obligations. Federal defendants submit that their legal obligation is not so broad as plaintiffs contend, and that UMTA's step-by-step plan leading to eventual accessibility for handicapped persons is legally sufficient. Federal defendants also submit that approval of the specific grant in question was consistent with this step-by-step approach, as well as with the applicable statutes. Thus, the scope of defendants' obligation to the handicapped is strictly a legal question, appropriate for summary judgment.

Plaintiffs assert that there was a disputed issue as to the capability of manufacturing accessible buses. 137/ We contend that there is no dispute on this issue; that prior to decision Judge Burke was made aware of the commercial availability of lift-equipped transit buses; and that his decision to grant summary judgment to defendants was not based upon any facts relating to this issue which are contested by plaintiffs. More importantly, we contend that inasmuch as there is no legal obligation to purchase wheelchair accessible buses, notwithstanding their availability, the question is immaterial. Similarly, the question of the effect that wheelchair-accessible vehicles might have on general transit services is immaterial in light of the fact that there is no legal obligation to integrate such vehicles into the fixed route system. 138/

Likewise, the motive or intent of government officials in pursuing particular policies or in approving this grant are immaterial. 139/

137/ Appellants' Brief at 35.

138/ Id.

139/ Id.

To interpret section 504 of the Rehabilitation Act or section 16(a) of the UMT Act to require a determination of the mental processes of government officials whenever a charge of discrimination is made is to misread those statutes, and would hopelessly clog the courts and impede the administration of the federal program of mass transit assistance conducted by federal defendants. The Supreme Court has stated that "... inquiry into the mental processes of administrative decisionmakers is usually to be avoided." 140/

Finally, the "special efforts" made by local defendants and the extent of transportation planning of services accessible to the handicapped are issues which are appropriate for summary judgment. In fact, no court which has considered alleged violations of the relevant statutes has refused to proceed by summary judgment. 141/ Even Bartels v. Biernat, supra, heavily relied upon by plaintiffs, was decided on a motion for summary judgment by plaintiffs therein.

Thus, Judge Burke was correct to grant defendants' motions for summary judgment in the instant case. In another civil rights case, this Court upheld a district court's grant of summary judgment to the defendant, saying as follows:

140/ Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 420.

141/ Snowden v. Birmingham-Jefferson County Transit Authority, supra; United Handicapped Federation v. Andre, supra; Young v. Coleman, supra; Bartels v. Biernat, supra.

"The proverbial 'right to a day in court' does not mean the actual presentation of the case in the context of a formal, evidentiary hearing, but rather 'the right to be duly cited to appear and to be afforded an opportunity to be heard.'" 142/

7. Remand Of This Case For Further Consideration In Light Of Recent Administrative Developments Is Unnecessary And Legally Unsound.

On June 21, 1977 the United States Court of Appeals for the Eighth Circuit ruled on the Andre case, discussed supra at page 14. 143/ In Andre, the District Court had granted summary judgment for defendants, on grounds that "special efforts" to aid the elderly and handicapped were being made. 144/ The District Court decision (filed March 11, 1976) predated UMTA's elderly and handicapped regulations, published on April 30, 1976 and made effective May 31, 1976. The Court of Appeals vacated the grant of summary judgment and remanded the case. The Court stated as its rationale:

"On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result. However, we feel that the denial of relief to the plaintiffs cannot be justified in light of these recent definitions and guidelines. Although the buses in question here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines. It is difficult to assess the record and the statutes in any other light.

142/ Mitchell v. National Broadcasting Co., 553 F.2d 265, 271 (2d Cir., 1977). (Citations omitted).

143/ The memorandum of opinion of the Court of Appeals is attached to this Brief as Attachment "B".

144/ 409 F. Supp. at 1300.

Under the circumstances we vacate the grant of summary judgment and remand to the district court for further proceedings. The district court, upon receiving further evidence, should reappraise defendants' compliance with the statutes, regulations and guidelines, and fashion whatever equitable relief it deems necessary." 145/

Of course, federal defendants agree with the Court of Appeals' finding that the District Court's result was correct. However, we question whether a remand in light of the subsequently promulgated regulations was proper. Clearly, the regulations are not retroactive, and they certainly had no application to the grant challenged in Andre, which was approved on June 12, 1974. 146/ The Eighth Circuit seemed to recognize this when it said:

"Although the buses here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines." (emphasis added).

This result is significantly different from the holding in Lloyd v. The Illinois Regional Transportation Authority. 147/ In Lloyd, plaintiffs had not challenged any particular grant, but sought generally to enjoin the operation of an allegedly inaccessible transit system. Hence, when the Seventh Circuit in Lloyd remanded so that the District Court could for the first time consider the merits, it was appropriate to suggest that plaintiffs be allowed to make post - May 31 allegations. 148/

145/ Attachment "B", slip opinion at pp. 7-8.

146/ 409 F. Supp. 1299.

147/ Discussed, supra, at pp. 26-27.

148/ 548 F. 2d at 1287, n. 30.

In Andre, however, as in the case at bar, a specific grant was challenged and found legally sufficient by the District Court. Plaintiffs had their day in court. An Appeals Court which then remands to determine whether subsequent actions are in compliance with newly promulgated regulations oversteps the boundary separating the proper roles of administrative agencies and reviewing courts. An agency like UMTA must be given the latitude to at least attempt initial enforcement of its regulations, especially when those regulations are brand new. If the agency fails to interpret or enforce its regulations, an aggrieved party may then seek the intervention of a court of law. 149/ The Andre decision short-circuits this long established and sensible sequence by making courts the initial arbiter of whether a local transit authority is complying with the new regulations as to projects not previously challenged.

The Andre decision not only represents an unwarranted intrusion into the proper functioning of an agency, it also threatens to produce litigation which never terminates. As described previously in this Brief, UMTA has devised a dynamic, step-by-step process for reaching the statutorily mandated goals. New and stricter requirements are placed upon grantees as the process evolves. If Andre is correct, a district court could decide that a defendant has complied with one phase of the process only to have the court of appeals remand to consider

149/ Plaintiffs nowhere allege that defendants are in violation of any particular section of the regulations. They merely contend that the regulations and guidelines reflect an intention to create a private cause of action under the relevant statutes. See Appellants' Brief at 19.

whether there has been compliance with the next, and stricter phase, and so on ad infinitum.

The federal defendants submit that this Court should not follow the Andre decision and order a remand. A remand in this case would, in fact, be even more inappropriate than in Andre, because Judge Burke was fully aware of UMTA's regulations when he decided the case. Unlike the District Court in Andre, Judge Burke was able to consider the regulations for whatever light they may shed on a pre-regulations grant. A remand for consideration under the regulation therefore, is not only inappropriate, but also unnecessary, since such consideration has already been made.

VI. CONCIUSION

UMTA's step-by-step efforts to bring about effective access to mass transportation for handicapped persons will ultimately give plaintiffs all the relief they desire. Plaintiffs apparently seek a mass transportation system that is effectively usable by handicapped persons, including wheelchair users and those with semiambulatory capabilities. The elderly and handicapped regulations assure that transit officials in Monroe County and throughout the nation must take steps to develop and establish transportation service for such persons that is "reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period". 150/

150/ 41 Fed. Reg. 18236 (April 30, 1976).

In addition, Secretary Adams' decision to mandate "Transbus" assures that all federally assisted standard size buses ordered by local transit authorities after September 30, 1979 must be fully accessible to wheelchair users and others who have difficulty climbing steps. In light of these major efforts, plaintiffs cannot complain that the mandate of the applicable statutes and the Constitution has not been fulfilled.

The ruling of the District Court in granting defendants' motions for summary judgment was therefore correct, and should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

GERALD J. HOULIHAN
Assistant United States Attorney
Western District of New York
United States Courthouse
Rochester, New York 14614

Of Counsel:

GERALD J. HOULIHAN
Assistant United States Attorney

ROBERT W. BATCHELDER
Acting Assistant Chief Counsel

GLENN F. WASSERMAN
Attorney Advisor
Urban Mass Transportation
Administration
400 7th Street, S.W.
Washington, D.C. 20590

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).



THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

May 19, 1977

DECISION OF BROCK ADAMS,
SECRETARY OF TRANSPORTATION,
TO MANDATE TRANSBUS

INTRODUCTION

The question before me is whether to mandate or encourage the acquisition of a low-floor, ramped bus ("Transbus") by all local transit authorities seeking federal assistance for the purchase of standard-size mass transit buses, after a certain date. Further questions include: if Transbus is mandated, what should be (i) the effective date of the mandate; (ii) the design of the bus; (iii) the federal role in introducing the bus; and (iv) the interim bus acquisition policy.

In 1971, the Urban Mass Transportation Administration ("UMTA") of the Department of Transportation ("DOT") initiated a major research project to develop an improved transit bus that would attract mass ridership, be accessible to those elderly and handicapped persons for whom the high floors and stairs of current buses provide serious obstacles and encourage continued competition among the manufacturers of transit buses. UMTA enlisted the aid of the three major domestic bus manufacturers, AM General, General Motors and the Flxible Co. (a wholly-owned subsidiary of Rohr Industries), to supply prototypes of such a bus for testing. Prototypes were built by all three manufacturers, tested by UMTA contractors and demonstrated in actual service in four cities. This process enabled the development of draft specifications for production of Transbus.

In July 1976, Robert E. Patricelli, who was then UMTA Administrator, announced that DOT would not mandate Transbus. Instead, the agency would permit the introduction of an advanced design bus ("ADB"), would mandate requirements for making buses accessible to elderly and handicapped passengers (to become effective on February 15, 1977) and would provide funds for research and development of under-the-floor components that would be needed by a low-floor bus in the future. This decision generated considerable public discussion. Many elderly and handicapped

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

2

groups asserted that the bus accessibility requirements were unsatisfactory. Litigation was initiated challenging UMTA's authority to fund acquisition of ADBs. Work on developing Transbus came to a virtual halt.

Shortly after I was sworn in as Secretary of Transportation in January, I took several steps to address these issues. First, I announced that the decision against mandating Transbus would be reconsidered and a public hearing on the matter would be held on March 15. Second, I waived that portion of the regulations on accessibility for the elderly and handicapped that might have been inconsistent with a future decision on Transbus, until after that decision was made. Third, I initiated new policies and procedures for the interim acquisition of ADBs. A decision on Transbus was promised by May 27.

In reviewing this matter I have had available to me the record on which former Administrator Patricelli based his decision, the transcript of the March 15 public hearing, written material subsequently submitted for the record, summaries of staff discussions with interested parties, also in the record, and, of course, the relevant statutes which I am responsible for administering.

THE DECISION

After carefully weighing the data and views submitted by manufacturers, the American Public Transit Association ("APTA"), individual transit authorities, groups representing the elderly and handicapped and others, I have decided, for the reasons stated below, to mandate Transbus. This mandate will take the form of requiring the use of a Transbus specification for all standard-size buses acquired with UMTA assistance. The mandate will apply to all procurements containing vehicle specifications approved by UMTA, issued for bid after September 30, 1979. The specifications already developed after consultation with APTA and others will be used with some minor modifications. The specifications include a requirement for a stationary floor height of not more than 22 inches, for an effective floor height including a kneeling feature of not more than 18 inches, and for a ramp for boarding and exiting.

Additionally, I have decided that DOT should encourage the formation of groups of purchasers to make the initial purchases of Transbus through advertised, low-bid competitions. Progress payments will be permitted for these initial purchases. Finally, I have decided to leave in effect the interim policy on accessibility for the elderly and handicapped. That is, manufacturers must continue to offer optional wheelchair lifts, and local transit authorities must either purchase buses with lifts or provide special services for elderly and handicapped passengers. Each of these decisions is discussed more fully below.

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

3

THE STATUTORY FRAMEWORK

In 1964, Congress responded to a growing pattern of declining ridership and increasing financial difficulties in the Nation's mass transportation systems by enacting the Urban Mass Transportation Act of 1964 (UMT Act). There have been several major amendments since 1964, and, as amended, it continues to provide the legislative basis for the federal role in urban mass transportation. Section 2 of the UMT Act states that its purposes are: to assist in the development of improved mass transportation facilities, equipment, techniques, and methods; to encourage the planning and establishment of areawide mass transportation systems needed for economical and desirable urban development; and to provide assistance to State and local governments and their instrumentalities in financing such systems.

To accomplish these purposes, sections 3 and 5 of the UMT Act authorize grants to State and local public bodies to assist in the financing of mass transportation related capital facilities including standard-size transit buses. The federal share of a capital facilities grant under section 3 is 80 percent of net project cost. Under section 5, which also authorizes payments for operating assistance, the Federal share of a capital facilities grant is a maximum of 80 percent of net project cost.^{1/}

Section 6 of the UMT Act, under which the Transbus research activities were funded, authorizes research, development and demonstration projects in all phases of urban mass transportation. Section 9 authorizes grants for urban mass transportation planning and technical studies.

A 1970 amendment to the UMT Act declared the mass transportation needs of elderly and handicapped persons to be of national importance and required DOT to exercise a special leadership role to insure that their rights were protected. This 1970 amendment added section 16 to the Act to read, in part, as follows:

SECTION 16. (a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively

^{1/} The Federal-Aid Highway Act of 1973 also authorizes capital assistance to mass transportation including assistance to acquire standard size transit buses.

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

4

utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this Act) should contain provisions implementing this policy.

Equally important, section 504 of the Rehabilitation Act of 1973 established the right of every handicapped person to be free of discrimination in any federally-assisted program. Section 504 reads:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Shortly after the adoption of section 16, DOT began implementing the legislative mandate requiring special federal leadership in the area of mass transportation for elderly and handicapped persons through written guidelines for UMTA grantees. UMTA also financed research and studies in the area. In April 1976, the earlier guidance to grantees was formalized and strengthened by the publication of UMTA's regulations on transportation for elderly and handicapped persons. These regulations set forth a comprehensive scheme of planning, service and design requirements.

DOT has long recognized that a low-floor, standard-size bus that provides access for nonambulatory and wheelchair-bound passengers would be an effective means to accommodate these several statutory mandates. The Transbus program was initiated, at least in part, to test the feasibility of such a bus. Of the methods of accomplishing accessibility that were studied and demonstrated in the Transbus program, UMTA acknowledged that the ramped Transbus emerged as the most desirable. The ramp was nonetheless not required in the specifications that were subsequently developed. The existing statutory mandates regarding transportation for the elderly and handicapped and the proven feasibility of a low-floor, ramped Transbus that will result in substantial benefits to the able-bodied as well as the disabled, argue convincingly for a Transbus mandate.

ATTACHMENT A -- Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

5

Section 16 of the UMT Act, section 504 of the Rehabilitation Act and other statutory provisions have resulted in a number of law-suits brought by elderly and handicapped persons. Although DOT has generally been successful in that litigation, litigation success alone provides no reason to avoid or defer a federal mandate of technological improvements as they become available, especially when, as here, those improvements significantly advance the mass transportation interests of all persons, including the elderly and handicapped, and when the improvements are quite unlikely to be introduced without a federal mandate.

There is one additional statutory reason, apart from improved accessibility, for mandating Transbus. First, DOT has a statutory obligation to assist in the development of improved mass transportation facilities and equipment. Until the recent introduction of ADBs there had been essentially no change in bus design since the advent of the "new look" bus in 1959. The advanced designs presently being offered are logical intermediate steps on the way to the introduction of Transbus, and in fact, they are in part outgrowths of the Transbus program. Yet these advanced designs fall short of accomplishing one of the major goals of the Transbus program--a low-floor with attendant benefits in boarding and exiting for all passengers. Thus, a Transbus mandate will bring to fruition the full benefits of federally-assisted research and development in the area of standard-size buses.

Finally, as the transit bus market has moved to new levels of product improvement, it has become increasingly difficult to fashion procurement methods since ADBs are of somewhat different designs, with different levels of performance and, quite naturally, different prices. A Transbus mandate will provide the necessary federal leadership in the marketplace to allow transit bus manufacturers to plan investments and tooling costs around certain required minimum performance and design characteristics. This, in turn, will permit low-bid procurements that will assist in the maintenance of a viable and competitive bus manufacturing industry based upon a predictable federal policy.

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

6

THE NEED FOR A MANDATE

A review of the history of the Transbus program convinces me that simply encouraging Transbus will not result in its prompt introduction and may not result in its introduction even in the long-run. Even after approximately \$27 million of UMTA investment, all serious efforts toward producing Transbus stopped when UMTA announced in July 1976 that it would not be mandated. The history of change in bus design is not one of constant innovation. As noted earlier, the so-called "new look" bus, the one currently in use, was introduced in 1959.^{1/} ADBs will not be on the streets for another year and do not offer the advances of Transbus.

A review of the statutes that guide this decision suggests strongly that any inclination to postpone a mandate further would thwart the intent of the Congress. A review of recent litigation suggests equally strongly that the courts are also not prepared to countenance needless delay in making urban mass transit vehicles accessible to the elderly and handicapped.

Even if the Congressional and judicial concerns were not as clear as they are, I believe it is my responsibility to insure to the extent feasible that no segment of our population is needlessly denied access to public transportation. It is now within our technological capability to insure that elderly and handicapped persons are accorded access to urban mass transit buses. This access is fundamental to the ability of such persons to lead independent and productive lives. In my view, a decision assuring that access could have been made some years ago.

Today, the ADB represents the state-of-the-art in bus design from the floor up. But their floor height (even with a kneeling feature) does not make them accessible to the elderly and handicapped without a wheelchair lift. The lift is an expensive piece of hardware, principally benefiting those in wheelchairs. Many of those individuals, however, regard the lift as degrading and have expressed concern about the difficulty and safety of using it. In addition, use of the lift slows bus operations since it takes time to deploy and other passengers cannot board or exit during that time.

The low-floor Transbus can, on the other hand, accommodate a ramp. The ramp is swift to deploy and can be used beneficially by many passengers, including most categories of mobile elderly and handicapped. A low-floor, ramped bus will decrease the loading and unloading time for all passengers.

^{1/} The lack of innovation in bus design prompted a study by the National Academy of Engineering (NAE) documenting the need for an improved transit bus. The NAE study concluded that a low-floor bus was: "The most desirable means--within the existing state of the art--for improving bus transportation." The low-floor, the NAE noted, would result in a bus that was "not only . . . easy and comfortable to use, but usable readily and without embarrassment by the physically and economically handicapped, the aged, the pregnant woman, the businessman, and the young adult."

**ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).**

7

It is important to keep in mind that in discussing bus accessibility for the elderly and handicapped we are not concerned only with those confined to wheelchairs. We are concerned as well with any mobility-impaired person, a group which numbers at least 10 million. At any time there may be many other riders who are at least temporarily disabled. We cannot deny these people the rights that so many others enjoy when it is within our ability to accord them such rights.

I am acutely aware that many who are opposed to Transbus argue that it is not now within our ability to produce a low-floor, ramped bus which can operate safely and efficiently in day-to-day transit service. These objections are discussed in detail below and, in my judgment, satisfactorily refuted.

Further, a Transbus mandate does not interfere with the traditional responsibility of local officials to plan for and implement mass transportation projects. Routes, schedules and fares continue to be matters of local decision and State and local officials retain the authority to plan for and implement all transit services including specialized services where these can contribute to overall mobility needs. For those communities utilizing standard-size bus service over fixed routes, the Transbus will permit faster and more efficient bus service by minimizing the time required to take on and discharge all passengers, including those who are elderly or handicapped. Better accessibility, new styling features and a better ride will attract and retain new ridership, add to the operating revenue of transit operators and enhance the image of mass transportation in every community. Moreover, testimony at the public hearing, as well as a number of comments on the Transbus question, indicate that several communities have been and continue to be vitally interested in obtaining low-floor standard-size buses, but have been unable to do so because of the commercial unavailability of Transbus. A Transbus mandate will permit DOT to be responsive to these locally conceived mass transportation objectives, as contemplated by the UMT Act.

THE EFFECTIVE DATE OF THE MANDATE

The record of the March 15 hearing (and the hearing conducted by UMTA in 1976) contains conflicting projections of when Transbus could be ready for production. AM General indicates that Transbus could be available approximately 34 months from the date of a mandate. Flxible says 36-60 months, and General Motors says five years. These manufacturers have different views about the desirability of Transbus and the adequacy of ADBs, and their existing investments reflect these judgments.

ATTACHMENT A - Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

8

My analysis of the entire record convinces me that all three current manufacturers could begin deliveries in 3-1/2 years. This date allows almost 2-1/2 years for development before bidding would begin, and approximately 15 months thereafter before the buses are actually delivered.

As I said in my opening remarks at the Transbus hearing, we have a very competent bus manufacturing industry and I believe competition, as well as innovation, must be encouraged. I am certain that these manufacturers can meet the challenge of producing Transbus. Additionally, I believe the pressure of effective competition among the manufacturers will result in a prompt introduction of this needed improvement. If one manufacturer is ready substantially before the effective date of the mandate, we will consider sole source procurements to get Transbus on the streets as soon as it is available.

Accordingly, as I stated above, I am ordering that all bus procurements utilizing UMTA capital assistance funds must use the Transbus specifications after September 30, 1979. I urge those manufacturers who can to make Transbus available voluntarily at an earlier date.

THE DESIGN OF TRANSBUS

In connection with the research effort to develop Transbus, UMTA developed a complete procurement document - the Transbus Procurement Requirements (TPR) - for use by local transit authorities in buying Transbuses. The document contains four parts:

- PART I : Bid Requirements/Contractual Provisions
Provides legal and other instruments for
procuring coaches;
- PART II : Technical Specifications
Specifies the buses being procured;
- PART III : Quality Assurance Provisions
Specifies the minimum quality control requirements in the manufacture of the buses; and
- PART IV : Warranty Provisions
Describes the warranty coverage on the buses
after their acceptance by local transit
authorities.

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

9

The TPR was developed for DOT by Booz-Allen Applied Research with full participation by the APTA Bus Technology Committee, AM General, General Motors, Flxible, and UMTA. It was designed to be used by procuring agencies in competitive procurements of Transbuses under the UMTA Capital Grants Program.

It was originally intended that the Transbus prototypes developed by each manufacturer would be tested and evaluated and a winning design selected for use by all manufacturers. However, while the three Transbus manufacturers met the performance requirements for Transbus prototypes, all three used different approaches based on their individual body styling, construction and manufacturing techniques. UMTA concluded that to require all three manufacturers to build buses around one manufacturer's design would put two of the manufacturers at an unnecessary competitive disadvantage and would stifle innovation. Thus, the design specification approach was abandoned on January 8, 1975, when UMTA announced a policy which would permit all three designs to qualify for production if they met a performance specification to be developed by UMTA as a result of testing and evaluation of the prototype vehicles.

The specifications that were developed as a result of this decision nevertheless include certain design requirements such as floor height, door width, step riser height and tread depths intended to insure that accessibility goals are met. The specifications include options for features such as power plant size, air-conditioning, bus width, bus length, etc. The TPR requires every manufacturer to be able to bid on any specified combination of options in direct cost competition. The specifications are intended to be modified, from time to time, as improved components or designs are developed.

I am today adopting, with some modifications, the specifications developed and set forth in the TPR. The most important modification is the one which makes the ramp a mandatory feature of the bus. The TPR, as modified, will be available from UMTA on June 13.

In my judgment, use of this specification will promote the earliest availability of Transbus without stifling innovation in manufacture and design.

THE FEDERAL ROLE IN INTRODUCING TRANSBUS

As I indicated above, DOT has already invested approximately \$27 million in the Transbus program. As a result of that investment we have learned what is and is not technologically feasible in

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

10

connection with development of a low-floor, ramped bus. We have identified the problems of the prototype buses as well as solutions to them. We have determined which components need further development, and which are presently able to be produced. In my judgment, the \$27 million was well spent.

I am aware that costs remain in connection with going to production model of Transbus. I am convinced, however, that this type of cost should properly be borne by the manufacturers. Direct federal funding for tooling and start-up costs is not appropriate given the knowledge and experience already gained through the DOT investment. Product quality, production methods and related matters are and should be uniquely the responsibility of the manufacturer.

This would not be the case had the federal investment not already proven the underlying feasibility of Transbus. We could not reasonably require manufacturers to invest in a wholly unproven technology. But, as discussed more completely elsewhere, I am convinced the technology for Transbus is proven and consequently I believe it appropriate to require the manufacturers to put that technology into production.

There is, however, another important responsibility for the government to undertake in introducing Transbus into the marketplace. We should, I believe, do everything feasible to assure early purchases of substantial numbers of the first production Transbuses. To this end, we will encourage formation of purchaser groups to make initial procurements of Transbuses from each manufacturer through advertised, low-bid competitions. While I do not think it is appropriate to allocate the market in an effort to guarantee that each manufacturer's bus will be bought, we will permit each consortium to make initial Transbus purchases from more than one manufacturer if the consortium members so desire.

Additionally, we will agree to make progress payments in connection with these initial purchases to help defray start-up production costs. As I have already stated, we will also consider making sole source procurements of any manufacturer's Transbus which is available substantially earlier than the others.

I believe that these steps represent the maximum necessary federal role in introducing Transbus.

INTERIM ACCESSIBILITY POLICY

I am aware that even after Transbus is mandated purchases of conventional buses will continue, with UMTA financial assistance, for

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

11

slightly more than two years. Inasmuch as these newly purchased buses will continue in operation for 12 or more years, I believe it is necessary to announce the policy that we will follow concerning accessibility of mass transit for elderly and handicapped in the period before the introduction of Transbus. I have decided that our existing policy in this matter should be continued.

That policy is based on requirements that all manufacturers offer optional equipment (e.g., lifts) for loading wheelchair-bound and other handicapped passengers, and that local transit authorities must either purchase accessible buses, or provide special services suitable for transporting elderly and handicapped passengers.

Many handicapped passengers have expressed concern about the operation and safety of the lift. Additionally, the lifts are cumbersome and time-consuming to operate and will become entirely outmoded by the Transbus ramp. They do, however, make buses accessible to mobility-impaired passengers. On the other hand, many elderly and handicapped representatives oppose special services since they require advance notification or have other disadvantages not associated with regular scheduled bus service. These representatives argue that "separate but equal" transit services are inherently unequal and do not enable elderly and handicapped persons to lead the most fully integrated lives possible.

Accordingly, I believe it appropriate to allow local governments to decide how best to serve their elderly and handicapped populations until Transbus is ready for production. Those who purchase lift-equipped buses will thereby offer substantially enhanced accessibility to their elderly and handicapped citizens. Those offering special services will provide valuable experience for the period after Transbus is introduced since even fully accessible fixed route buses will not meet the transportation needs of all elderly and handicapped. DOT will carefully monitor the activities of grantees of UMTA funds to be certain that the transportation needs of elderly and handicapped citizens are being addressed.

THE TECHNOLOGICAL FEASIBILITY OF TRANSBUS

A critical factor in determining the desirability of a Federal mandate of Transbus is technological and economic feasibility. I find that a bus that meets the existing Transbus specifications, as modified to require a ramp, serves the needs of the elderly and handicapped, can be produced in a reasonable period of time and would be operationally acceptable.

ATTACHMENT A -- Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

12

Axles, tires and brakes are the most unique components of the Transbus. These components do not require technological breakthroughs, but merely enough time for proper development. The Transbus prototypes, manufactured by AM General, General Motors and Flxible, showed that in at least one instance the new axles were lightweight, used many existing internal subcomponents and can accommodate the current design automatic transmission.

Similarly, Transbus will probably require tires which are substantially smaller than those presently available. Such tires have been undergoing development for some time and could be put into production in time for Transbus deliveries. While I understand that these tires will have shorter lives than current tires, estimates of Transbus operating costs, as discussed later, include an assumption that the smaller tires will be used. In my view, any problems that the tires may cause are more than offset by the greater accessibility of the Transbus.

Transbus brakes will also be somewhat different than existing bus brakes, yet will utilize essentially the same technology. Despite the smaller diameter wheels, the Transbus specification provides for more brake area per pound of vehicle weight than on current buses. Since this specification can be met using conventional drum brakes, very little development will be required.

Several Transbus operating issues have arisen. These include road clearance, problems associated with the kneeling feature and the appropriate width of the front door. Because the Transbus prototypes experienced minor road clearance problems, the final Transbus specifications require additional road clearance. After the prototypes were tested, every observed ground clearance problem was carefully analyzed and the final specifications written so as to eliminate those problems within the limits of the prototype technology. The specifications call for road clearance equivalent to or better than that attained by all three current model buses.

Some problems have been experienced in the past with the kneeling feature found on ADBs, some current buses and Transbus. First, the earliest kneeling devices did not always operate properly. This was found to be a result of corrosion within electrical components. When greater protection for that system was provided, the problem was solved. Further, there were complaints of drivers not kneeling the bus when passengers needed it. While this remains a potential problem, it can be overcome by proper driver training. A bus that can kneel to at least 18 inches will benefit all passengers, not just those who need the ramp. These benefits far outweigh the difficulties.

ATTACHMENT A — Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

13

The front door width called for in the specifications is 44 inches. This is wide enough to allow room for wheelchair-bound passengers or to allow for a double stream of ambulatory passengers. This feature is desired by many operators because it allows an inbound and outbound stream at the same time, thus shortening the loading and unloading time. Some operators prefer a narrow (24") door making a double stream impossible and, therefore, fares easier to collect. The productivity improvements stemming from the wide door and consequent reduced loading time should more than offset any occasional inconvenience in fare collection, and the wide door is a prerequisite to achieving accessibility. For these reasons, the narrow door option has been dropped from the specifications.

The record of the public hearing and studies done for UMTA demonstrate the efficacy of the ramp in providing access for those with mobility impairments. The Transbus specifications call for a ramp that will yield the full benefit of this technology. The specifications provide that the maximum ramp angle on a level street with no curb must not be more than 14 degrees. This means that on a level street with a six-inch curb, the ramp angle will be less than ten degrees; even with a typical crowned street and no curb, the ramp angle would be approximately 15 degrees. This is within the range in which most wheelchair-bound persons can be expected to make unassisted entry although in some cases those in wheelchairs may need assistance in exiting. These angles can be accommodated with a ramp not more than 6 feet long and a slight incline where the ramp meets the bus floor. This type of technology has already been utilized by at least one of the prototype manufacturers.

Probably the most complex feasibility questions with respect to Transbus involve its economic viability. The Transbus prototypes included spacious seating arrangements with seating capacity for 42 to 43 people as compared to the maximum seating capacity of current production buses of 51 to 53. Actually, Transbus could have a seating capacity of 47 if it is designed with that goal in mind. ADBs seat between 43-47 passengers, depending on their seat design. Therefore, I do not believe that there will be a serious loss of seating capacity. Moreover, full load capacity is more relevant in determining transit system revenues, and Transbus will have a full load capacity comparable to current buses.

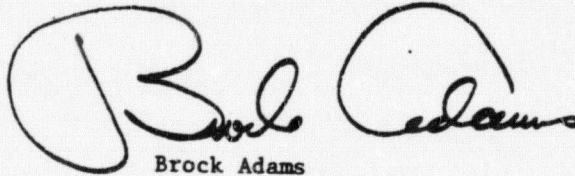
A similar situation exists with regard to weight and fuel economy. The Transbus specifications require that curb weight not exceed 26,000 pounds. This weight is about 1,000 to 2,000 pounds more than current production buses but is the same as the ADB specifications. The added

ATTACHMENT A - Decision of Brock Adams, Secretary of
Transportation, to Mandate Transbus (May 19, 1977).

14

weight is a reflection of the need for an additional axle and related components. Transbus reliability and maintainability have become issues as a result of the greater complexity of Transbus prototypes, especially as compared to current buses. The low-floor of the Transbus necessitates greater mechanical complexity in the running gear of the bus, but does not necessitate new or unique technology. It is important to remember that there has been no significant change in bus design in almost 20 years. It is not surprising, therefore, that those with responsibility for maintaining buses are concerned. Experience and familiarity with these changes and good product design will remedy this problem. I am, therefore, convinced that bus maintainability and reliability will not be seriously affected. Above the floor, Transbus will be similar to ADBs. We will have had considerable experience with ADBs before Transbuses are actually on the street.

Because of its greater complexity, smaller diameter tires and slightly increased weight, the Transbus will cost more than the current bus. The most reliable cost estimates indicate that, while the initial cost of Transbus will be approximately 15 to 18 percent more than current buses, this is only about five percent more than ADBs. A comprehensive analysis of cost estimates showed that the Transbus would have operating costs only about one percent higher than current buses. I conclude that these added costs are not unreasonable in light of the substantial benefits to all bus riders which Transbus will provide.

A large, stylized handwritten signature in dark ink, appearing to read 'Brock Adams'.

Brock Adams
Secretary of Transportation
Washington, D.C.

ATTACHMENT B - United Handicapped Federation v. Andre,
No. 76-1369 (8th Cir., June 21, 1977).

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1369

United Handicapped Federation,	:	
a Minnesota Non-Profit	:	
Corporation, et al.,	:	
	:	
Appellants,	:	Appeal from the United States
	:	District Court for the
v.	:	District of Minnesota
	:	
Camille D. Andre, Individually	:	
and in his official capacity	:	
as Chief Administrator of	:	
Metropolitan Transit	:	
Commission, et al.,	:	
	:	
Appellees.	:	

Submitted: February 15, 1977

Filed: June 21, 1977

Before LAY and STEPHENSON, Circuit Judges, and SMITH,*
 Senior District Judge.

LAY, Circuit Judge.

This is a civil action brought by the United Handicapped Federation, the National Paraplegia Foundation, and six mobility handicapped individuals against officials of the Metropolitan Transit Commission (MTC), the Secretary of the United States Department of Transportation, the Administrator of the Urban Mass Transportation Administration (UMTA), and the AM General Corporation. The complaint alleges that the defendants failed to make urban mass transit equipment

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

purchased with federal financial aid fully accessible to all handicapped persons. Plaintiffs allege that the defendants have violated the Fourteenth Amendment to the United States Constitution, § 504 of the Rehabilitation Act of 1973,¹ § 16(a) of the Urban Mass Transportation Act of 1964 as amended,² §§ 105(a) and (b) of the Federal-Aid Highway Amendments of 1974,³ § 315 of the Department of Transportation and Related Agencies Appropriations Act of 1975,⁴ Minn. Stat. Ann. Chapt. 256C, and 42 U.S.C. §§ 1983 and 1985(3).

Plaintiffs originally sought preliminary injunctive relief to restrain MTC and UMTA⁵ from the purchase of 338 standard size buses which were to be used in a seven-county metropolitan area and which were not equipped to transport passengers confined to wheelchairs. The district court denied a preliminary injunction and the buses were subsequently delivered and payment made. The plaintiffs continued to seek declaratory and other injunctive relief.

On March 11, 1976, the district court, the Honorable Donald D. Alsop, granted defendants' motion for summary judgment, ruling that none of the statutes relied on by plaintiffs required that every standard size bus purchased with federal assistance be specially equipped to transport

¹29 U.S.C. § 794.

²49 U.S.C. § 1612.

³Pub.L. No. 93-643, 88 Stat. 2282.

⁴Pub.L. No. 93-391, 88 Stat. 781.

⁵UMTA was to contribute 80 per cent of the funding for the buses.

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

passengers confined to wheel chairs.⁶ He further held that defendants had made "special efforts" to aid the elderly and handicapped in utilization of the mass transportation system. Finding no violations of the statutes or of the Constitution, the district court stated:

UMTA has, in accordance with the mandate of Congress pursuant to the Urban Mass Transportation (UMT) Act of 1964, as amended, 49 U.S.C. § 1601 et seq., carried on extensive research, planning, and design of mass transportation services and facilities to provide for effective utilization of mass transportation by the elderly and physically handicapped. Included in these efforts are the ongoing research and development of facilities and services, approval of grants for the purchase of vans and small buses equipped to meet the needs of the elderly and handicapped, development of the "TRANSBUS," publication of Notice of Rulemaking, and a requirement in grant approvals that the elderly and handicapped be charged reduced rates during non-peak hours.

United Handicapped Federation v. Andre, 409 F. Supp. 1297, 1299 (D. Minn. 1976).⁷

⁶At the time of the district court's opinion several other suits seeking the same or similar relief had been brought or were pending in other district courts. See, e.g., *Webb v. Miami Valley Regional Transit Authority*, Civ. No. C-3-75-67, (S.D. Ohio, Jan. 19, 1976); *Lloyd v. Illinois Regional Transp. Authority*, No. 75-C-1834 (N.D. Ill. filed Mar. 16, 1976), rev'd, No. 76-1524 (7th Cir., filed Jan. 8, 1977); and *Snowden v. Birmingham-Jefferson County Transit Authority*, 407 F. Supp. 394 (N.D. Ala. 1975), aff'd, No. 75-3411 (5th Cir., filed Apr. 21, 1977).

⁷The Urban Mass Transportation Act of 1964, as amended, declares it to be a national policy that:

[E]lderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

Although Judge Alsop found that defendants were in full compliance with the "special efforts" requirements under the laws, we note that his decision was rendered prior to the issuance of UMTA regulations, in part under the authority of § 504.

Judge Alsop's opinion does not discuss whether the plaintiffs have any standing to bring a private claim for relief or whether any of the statutes place affirmative duties on the defendants. We assume the district court felt it did not have to pass on these issues since, in any event, it found that defendants had complied with the statutes.

In Lloyd v. Illinois Regional Transp. Authority, No. 75-C-1834 (N.D. Ill., filed Mar. 16, 1976), rev'd, No. 76-1524 (7th Cir., filed Jan. 8, 1977), the district court granted defendant's motion for summary judgment under a complaint similar to the one filed here. The Seventh Circuit reversed finding that § 504⁸ did place affirmative duties on the mass

7 (continued)

persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

49 U.S.C. § 1612.

⁸Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

public transportation systems in that region, and that plaintiffs (who were defined as a class of mobility disabled persons in the northeastern region of Illinois) had standing to seek declaratory and injunctive relief under § 504 and regulations. See Lloyd v. Regional Transp. Authority, No. 76-1524 (7th Cir., filed Jan. 8, 1977).

Although the postures at the time of appeal of the Lloyd case and the present one appear different (in Lloyd the district court dismissed the complaint for failure to state a claim for relief; here the district court granted summary judgment on the merits), they are parallel in that all plaintiffs are denied relief. In one sense, the district court's action here is more final than in Lloyd since no further relief can be forthcoming. After reviewing the Seventh Circuit's reversal in the Lloyd case we find we must remand to the district court for reconsideration of defendants' duties under the statutes and administrative regulations and guidelines.

We adhere to the reasoning of Judge Cummings in his excellent analysis in the Lloyd appeal, and find that § 504 does create an affirmative duty on the part of these defendants. We also agree that plaintiffs do have standing to bring a private cause of action.

Subsequent to the district court's decision, regulations and accompanying guidelines were promulgated and became effective May 31, 1976. See 49 C.F.R. 609.1 - 609.25 and 613.204. One regulation provides that the UMTA administrator

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

will grant project approvals only if:

(a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons; and

(b) The annual element of the transportation improvement program developed pursuant to 23 CFR 450.118 and submitted after September 30, 1976, contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities; and

(c) After September 30, 1977, reasonable progress has been demonstrated in implementing previously programmed projects.
49 C.F.R. § 613.204 (emphasis added).

Guidance on the meaning of special efforts in planning is set forth in 23 C.F.R. Part 450, Subpart A, issued simultaneously with the above regulations:

The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term "special efforts" refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, "special efforts" in planning means genuine, good-faith progress in planning service for wheelchair users and semi-ambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period.
(Emphasis added).

Examples of what affirmative duties will satisfy "special

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

efforts" requirements are given in 49 C.F.R. Part 613, Subpart B.⁹ In addition to these positive examples, proposed regulations of the Health, Education, and Welfare Department indicate what recipients of federal assistance may not do. See 45 C.F.R. § 84.4.¹⁰

On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result. However, we feel that the denial of

⁹One example of a level of effort that will be deemed to satisfy the "special efforts" requirement is:

Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or, in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

49 C.F.R. Part 613, Subpart B (Appendix).

¹⁰Under the proposed Health, Education, and Welfare Department regulations a federal assistance recipient could not, for example:

Provide a qualified handicapped person with aid, benefit, or service which is not as effective as that provided to others; [or]

.

Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit or service.

45 C.F.R. § 84.4(b)(1)(ii) and (iv).

Moreover § 84.4(b)(2) would establish that:

A recipient may not provide different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others.

ATTACHMENT B — *United Handicapped Federation v. Andre*,
No. 76-1369 (8th Cir., June 21, 1977).

relief to the plaintiffs cannot be justified in light of these recent definitions and guidelines. Although the buses in question here have been purchased and placed in service, because of the recent developments the defendants now have the burden to take affirmative action to conform to the regulations and guidelines. It is difficult to assess the record and the statutes in any other light.¹¹

Under the circumstances we vacate the grant of summary judgment and remand to the district court for further proceedings. The district court, upon receiving further evidence, should reappraise defendants' compliance with the statutes, regulations and guidelines, and fashion whatever equitable relief it deems necessary.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

¹¹On May 19, 1977, Brock Adams, the Secretary of Transportation, issued a decision mandating the use of a low-floor, ramped bus, "Transbus," by all local transit authorities seeking federal assistance for the purchase of standard-size mass transit buses, after September 30, 1979. In the interim the present policy on accessibility for the elderly and handicapped contained in the statutes, guidelines and regulations is to continue. Adams stated:

[M]anufacturers must continue to offer optional wheelchair lifts, and local transit authorities must either purchase buses with lifts or provide special services for elderly and handicapped passengers.

ATTACHMENT C - Vanko v. Finley, No. C76-1305 (N.D.
Ohio, June 1, 1977).

RECEIVED
JUN 2 2 01 PM '77
U.S. ATTORNEY
CLEVELAND, OHIO

FILED
JUN 1 4 20 PM '77
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETER VANKO	)	C 76-1305
	)	
Plaintiff	)	Judge William K. Thomas
	)	
v.	)	
	)	
DALE R. FINLEY, et al.)	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

Plaintiff Peter Vanko filed this action on December 14, 1976 against defendant board members of Cuyahoga County's Regional Transit Authority (hereinafter referred to as "RTA"), then Secretary of Transportation William T. Coleman, Jr., and Robert Patricelli, Administrator of the United States Urban Mass Transportation Administration. Vanko seeks to bring the action both on his own behalf and as representative of the class of "mobility handicapped" individuals within Cuyahoga County. His complaint asks for declaratory and injunctive relief and alleges that the defendants have denied him and other similarly situated individuals access to transportation facilities provided by the RTA in violation of Section 16(a) of the Urban Mass Transportation Act of 1964, 49 U.S.C. §1612(a); Section 504

ATTACHMENT C - *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

of the Rehabilitation Act of 1973, 29 U.S.C. §794; the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974); and the Fifth and Fourteenth Amendments to, and commerce clause of, the United States Constitution. The complaint premises jurisdiction upon 28 U.S.C. §§1331, 1337, 1343 and 5 U.S.C. §762.

The affidavit of plaintiff Vanko states that he is confined to a wheelchair due to a birth defect and is employed by the J & B Stamping Company of Brooklyn, Ohio. Although this company is accessible by public transportation, because of his confinement to a wheelchair Vanko cannot utilize the public transit which RTA provides.

In his prayer for relief, plaintiff asks this court to enter a preliminary injunction enjoining the defendants from taking any action toward the purchase of any mass transit vehicles; to issue a declaratory judgment that the Regional Transit Authority is currently being operated in violation of federal statutory and constitutional provisions; to permanently enjoin defendant RTA board members from operating the RTA in a manner which does not assure effective utilization of the system by the mobility handicapped; and to permanently enjoin defendants Coleman and Patricelli from releasing federal funds to RTA until the system is operated so as to provide for effective utilization by the handicapped.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

The injunctive prayers for relief are specifically aimed at preventing the release of federal funds to RTA under the terms of a July 28, 1976 RTA application to the Urban Mass Transit Administration for federal financial assistance. This application requests federal funds of \$99,547,200 as part of a capital improvements plan totaling \$124,434,000.

Both the defendant board members of the RTA (hereinafter the "local defendants") and Secretary Coleman and Administrator Patricelli (hereinafter the "federal defendants") have moved to dismiss the complaint or, in the alternative, for summary judgment, and plaintiff has submitted a brief in opposition to these motions. The motions will now be considered and will be treated as motions for summary judgment, since matters outside the pleadings have been submitted to, and considered by, the court in ruling on the motions.

I.

Neither set of defendants have challenged plaintiff's authority to bring this lawsuit. The court at the outset finds that the plaintiff, Peter Vanko, has standing to bring this action pursuant to Section Ten of the Administrative Procedure Act, 5 U.S.C. §702, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Bartels v. Biernat, 405 F.Supp. 1012 (E.D. Wis. 1975), and that he also has an implied right of action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Lloyd v. Regional Transit Authority, 548 F.2d 1277 (7th Cir. 1977). The court, therefore, need not, at this

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

point, decide whether plaintiff can maintain a private right of action based upon the other statutes and constitutional provisions relied upon in the complaint.

Although the defendants do not challenge plaintiff's authority to bring this action, the local defendants contend that the court is precluded from entertaining this lawsuit at this time because of the doctrine of primary jurisdiction. This defense was originally based on the theory that the federal government had not yet acted upon RTA's grant application and that the completion of federal administrative action is a prerequisite to judicial consideration of this lawsuit. The court has been informed by Mr. Arthur Fitzgerald, Chief Assistant General Counsel of RTA, that federal approval of at least a portion of RTA's grant application has¹ been obtained since the briefing of the motion at issue. Since the Urban Mass Transportation Administration has acted on the RTA request for federal funding for purchases of additional rolling stock (disagreement over such purchases being the crux of the parties' dispute in this lawsuit), the court concludes that it has jurisdiction to entertain the

1. According to Mr. Fitzgerald, the federal government approved a grant of \$55,108,280 to RTA on January 12, 1977. This approval included federal financing for the purchase of one-hundred and sixty-five buses, thirty special vehicles for the handicapped and elderly, and seventy-five heavy and light rapid transit cars. The remainder of the \$99,547,200 request has not been acted upon, pending the completion of engineering studies.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

action at this time. See also *Lloyd v. Regional Transportation Authority, supra*, at 1287.

A second procedural defense raised by the local defendants is that the plaintiff has failed to join the Regional Transit Authority as a party defendant and that the RTA is an indispensable party for the purposes of Rule 19 of the Federal Rules of Civil Procedure. The court agrees with these defendants that the RTA as a corporate body should be joined as a defendant to this lawsuit. This does not mean, as the local defendants argue, that plaintiff's lawsuit must be dismissed for failure to sue RTA. The court instead orders, pursuant to Rule 19(a), that the RTA in its corporate capacity be joined as a party defendant.

The final procedural objection the local defendants raise to plaintiff's complaint is that the RTA board members are named as defendants in both their official and individual capacities, while the facts asserted in, and prayer for relief of, the complaint concern only actions of the RTA and its board members in their official capacities. Since this is the case, and since the relief sought is solely equitable and of a character which only the corporate body of the RTA can furnish, the complaint is ordered dismissed as against the RTA board members in their individual (but not official) capacities.

II.

A.

The non-procedural aspects of defendants' motions for summary judgment will now be considered. Plaintiff's

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

first claim for relief is premised upon the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601, et seq., and, more specifically, upon Section 16(a) of that act, 49 U.S.C. §1612(a), which provides:

(a) It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy.

Plaintiff contends that the "special efforts" mandated by this section require the defendants "to act so as to ensure that all transit rolling stock and facilities can be effectively utilized by all mobile disabled and elderly people." The defendants' position is that neither the Urban Mass Transportation Act nor the other statutory or constitutional provisions relied upon by plaintiff require "that every regular route vehicle must be accessible to every person with a mobility handicap, including those who must ambulate by wheelchair". The defendants instead contend that they have met the act's requirement of "special efforts" by the institution of several programs and policies designed to benefit the handicapped and elderly, such programs being collectively entitled Community Responsive Transportation (CRT).

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D. Ohio, June 1, 1977).

This court cannot accept plaintiff's broad reading of 49 U.S.C. §1612. To the contrary, the court specifically rejects plaintiff's contention that this statutory provision requires that "all transit rolling stock and facilities [must be able to be] effectively utilized by all mobile disabled and elderly people."² Leary v. Crapsey, Civil No. 76-286 (W.D. N.Y. Mar. 31, 1977); Young v. Coleman, Civil No. E-76-201 (D. Conn. Dec. 17, 1976); United Handicapped Federation v. Andre, 409 F.Supp. 1297 (D. Minn. 1976); Snowden v. Birmingham - Jefferson County Transit Authority, 407 F.Supp. 394 (N.D. Ala. 1975), aff'd (5th Cir. April 21, 1977) Bohlke v. Golden Gate Bridge, Highway, and Transportation District, No. 73362 (Marin County, California Superior Court, May 9, 1975). In establishing a national policy to guarantee mass transit utilization rights for the handicapped,

2. On May 19, 1977 Secretary of Transportation Brock Adams ordered that all buses bought with Department of Transportation funds after September 30, 1979 must conform to the Department's "Transbus" prototype specifications. One of these specifications requires a ramp suitable for wheelchair boarding. Buses of such design are not now commercially available and the court therefore finds that the Secretary's decision has no direct bearing on this case. See May 19, 1977 Decision of Brock Adams, Secretary of Transportation, to Mandate Transbus.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

Congress did not create immediate rights of access for all handicapped individuals to all mass transit facilities.³

The plaintiff has left uncontroverted RTA's estimate that a fully accessible transit system would require \$66,800,000 in capital expenditures and an additional

3. Although such universal accessibility was undoubtedly the goal of the 1970 Urban Mass Transportation Act amendment, Congress was certainly cognizant of the technological and economic problems which immediate requirement of universal accessibility would create. See 41 Fed. Reg. 18236 (April 30, 1976) (wherein it is stated that "no manufacturer of full-size transit buses presently offers a lift or a ramp option for its buses..."), May 19, 1977 Decision of Brock Adams, *supra*, pp. 7-8 (wherein the Secretary found it will be three and one-half years before deliveries of the ramp-equipped Transbus can begin). Congress's mandate that mass transit systems undertake "special efforts" for the elderly and handicapped is therefore a dynamic, rather than a static, requirement, the specific contours of which can only be defined by the state of mass transportation technology at any particular moment. Since the plaintiff has not rebutted the defendants' showing of the economic infeasibility of universal access (and has not cited the court to any evidence that a universally accessible transit vehicle is currently technologically feasible), Section 16(a) of the Urban Mass Transportation Act does not now, in 1977, require universal accessibility.

The Secretary of Transportation recently addressed the question of the DOT's accessibility policy prior to September 30, 1979 (after which date all buses must conform to DOT's "Transbus" prototype and contain wheelchair accessibility ramps):

...I believe it appropriate to allow local governments to decide how best to serve their elderly and handicapped populations until Transbus is ready for production. Those who purchase lift-equipped buses will thereby offer substantially enhanced accessibility to their elderly and handicapped citizens. Those offering special services will provide valuable experience for the period after Transbus is introduced since even fully accessible fixed route buses will not meet the transportation needs of all elderly and handicapped.

May 19, 1977 Decision of Brock Adams, *supra*.

The court notes that much of the legislative history cited by plaintiff is not inconsistent with this footnote's interpretation of 49 U.S.C. §1612(a): an interpretation of "special efforts" that requires integration of many of the nation's mobility handicapped into mass transit systems at once, and eventual integration of wheelchair users into these systems when technology permits.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

\$10,880,000 per year in increased operating expenses (the total cost of operation of RTA's bus and rapid transit systems in 1976 was \$40,150,000).⁴ Expenditures of this magnitude for an estimated 1,700 to 8,600 persons confined to wheelchairs are not required by Section 16(a) of the Urban Mass Transportation Act, when, as in this case, adequate transit services for all persons in Cuyahoga County

4. These figures are taken from the June 2, 1976 statement of Leonard Ronis, RTA's general manager, to the House Public Works Committee, which is Attachment D to Appendix E of the federal defendants' brief. Mr. Ronis also told the House Committee that RTA estimates there are approximately 1,700 potential transit users confined to wheelchairs in the Cleveland area, of whom 200 to 250 would probably utilize a fully accessible RTA on a daily basis. Attachment C to Appendix E refers to the Harvard Report on Community Responsive Transit which estimated that 8,600 persons confined to wheelchairs might use a specialized transit system for the handicapped (this estimate, however, was based on national averages rather than a local population analysis). Even taking the Harvard figures on potential users, the additional cost of total accessibility would be \$1,265 per year per potential user and \$7,767 per user for the required capital outlay. If RTA's own figures on estimated actual (rather than potential) users are accepted, the costs per user soar to \$43,520 to \$54,400 per year and \$267,200 to \$334,000 in capital expenditures.

Defendants further point out in their briefs that wheelchair users might not be able to take advantage of a fully accessible bus system during the winter months when snow covers Cuyahoga County sidewalks and streets. Any such problems in getting from one's home to the bus are minimized by CRT's door-to-door service.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

can apparently be provided at a fraction of such cost.⁵
Although the court is cognizant of the psychological and
rehabilitative benefits to be gained from integrating
wheelchair users into the regular transit system, the
Regional Transit Authority is only required to provide mass
transit that the handicapped and elderly can "effectively
utilize". The court, therefore, holds that there is no
statutory infirmity in RTA's basic approach to Section 16(a)
special efforts compliance (the operation of a separate
paratransport system parallel to the main bus and rapid
systems).⁶

B.

Although the court rejects plaintiff's argument that the
Urban Mass Transportation Act of 1964 requires that all
rapid transit vehicles must be universally accessible, it
nevertheless feels that on the present record summary
judgment for the defendants is inappropriate. However,
as hereafter explained, the court reserves final ruling on
the defendants' motions pending augmentation of the record

5. Assuming that RTA has a limited amount of money
with which to work, expenditures of the magnitude necessary
to create a fully accessible transit system not only mean
that there will be less money for the general transit system,
but also that RTA will not be able to provide as complete
services as it might otherwise be able to for the elderly
and handicapped who are not confined to wheelchairs. Such
possible conflicts of interest among the mobility handicapped
must, of course, be addressed by this court in any eventual
consideration of Peter Vanko's request for class certifica-
tion of his lawsuit.

6. Although defendants are not on this record
required to make all RTA buses accessible to wheelchair users,
any new buses ordered will be accessible to most other
elderly and handicapped persons who are not confined to
wheelchairs. See 49 C.F.R. §609.15.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

and submission of supplemental briefs. Two issues left unresolved on this record are whether the RTA is required by the applicable federal statutes to provide service for elderly and handicapped individuals "that is reasonable by comparison with the service provided to the general public"⁷ and whether, if it is required to provide comparable service,⁸ it is in fact meeting such requirement. The briefs submitted to this court, as well as all of the cases cited to the court, focus on the question of whether or not RTA must make all of its vehicles fully accessible and have not considered in any depth the extent to which federal statutes may require comparable, but non-integrated, transit services for the wheelchair confined and other handicapped and elderly individuals. The court, therefore, orders the parties to submit to the court supplemental briefs on this legal issue, as well as any affidavits or other documentation that bears on the comparability of services provided by RTA's Community Responsive Transit and RTA's general transit services. Such

7. This quotation is taken from the definition of Section 16(a) "special efforts" contained in the appendix to the Urban Mass Transportation Planning regulations implementing the 1964 Urban Mass Transportation Act. 41 Fed. Reg. 18236 (April 30, 1976).

8. The parties are also requested to address the issue of what this court's scope of review should be if it determines that comparability is required between mass transit services for the handicapped and the general public. See e.g., *Kendler v. Wirtz*, 388 F.2d 381 (3d Cir. 1968); *Pullman Incorporated v. Volpe*, 337 F.Supp. 432 (E.D. Pa. 1971).

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

information should include current data on the coverage of CRT both in terms of the area in which the program is in effect and the hours and days per week of its operation.⁹ These further submissions should be made to the court within twenty days from the date of this memorandum and order.

C.

Plaintiff has also claimed relief against local and federal defendants under the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974), and the commerce, due process, equal protection, and privileges and immunities clauses of the United States Constitution. Since ruling is reserved on the defendants' motions for summary judgment, it is unnecessary to discuss plaintiff's claims under these other statutory and constitutional claims at length. The separate provisions will now be considered briefly, however.

The Rehabilitation Act claim of plaintiff is based upon 29 U.S.C. §794, which provides that:

9. The parties should also try to assess CRT in light of the examples of "special efforts" programs contained in the appendix to 49 C.F.R. §613.204.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As to this statutory claim, the court adopts the reasoning of Part II.B. of this opinion and finds that the same issue remains unresolved under the Rehabilitation Act of 1973 as under the Urban Mass Transportation Act of 1964: i.e., whether RTA is required to provide services for the elderly and handicapped which are reasonably comparable to the services provided the general public and, if such a requirement exists, whether RTA is in compliance with it. The court, however, specifically rejects the plaintiff's contention that the Rehabilitation Act of 1973 or the regula-¹⁰tions promulgated thereunder require the defendants to¹¹ make all RTA buses accessible to wheelchairs.

10. These include regulations promulgated by H.E.W., 42 Fed. Reg. 22675 (May 4, 1977) (which are inapplicable in this case, but instructive) and the UMTA regulations promulgated upon the authority of both the Rehabilitation Act of 1973 and the Urban Mass Transportation Act, 49 C.F.R. §609.1 et seq.

11. Both sets of defendants have cited *Young v. Coleman*, supra, to support their contention that the Rehabilitation Act of 1973 does not require all buses to be wheelchair accessible. Their briefs specifically quote that opinion's citation of 29 U.S.C. §792(c)(1)(A), which is also a part of the 1973 Rehabilitation Act:

"The [Transportation Barriers Compliance Board] shall also...determine how and to what extent transportation barriers impede the mobility of handicapped individuals and aged handicapped individuals and consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems... (Emphasis added)."

The court agrees with the defendants that this provision is evidence that Congress did not intend the Rehabilitation Act to require that all handicapped individuals be fully integrated into main-stream mass transit systems. The court notes, however, the Rehabilitation Act Congress's interest in providing adequate transportation for gainfully employed handicapped individuals.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

Plaintiff's third claim for relief is based upon the Department of Transportation and Related Agencies Act of 1975, Pub. L. No. 93-391, 88 Stat. 769 (1974), Section 315 of which provides:

SEC. 315. None of the funds provided under this Act shall be available for the purchase of passenger rail or subway cars, for the purchase of motor buses or for the construction of related facilities unless such cars, buses and facilities are designed to meet the mass transportation needs of the elderly and the handicapped.

This section of the appropriations bill is of no benefit to plaintiff, however, since it only restricts the allocation of funds under that particular allocations act. In this 1974 act, Congress only appropriated money for the fiscal year ending June 30, 1975 and thus RTA cannot now receive funds from this 1974-75 appropriation.¹² Thus, defendants are not in violation of Pub. L. No. 93-391, and plaintiff's claim, insofar as it is based on this act, is ordered dismissed.

Since the enactment of this 1974 legislation, Congress has passed two other appropriations acts to fund the Department of Transportation for the fiscal years ending June 30, 1976 and June 30, 1977. Pub. L. No. 94-134, 89 Stat. 695 (1975); Pub. L. No. 94-387, 90 Stat. 1171 (1976). Neither of these acts have language similar to the 1974-75

12. Plaintiff nowhere contends in his complaint, briefs, or affidavit that the funds in question stem from this 1974-75 appropriations bill.

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

appropriations bills, and thus they too are of no help to
13
plaintiff.

Plaintiff's fourth and final claim for relief is constitutional in nature, based upon the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the privileges and immunities clause of the Fourteenth Amendment to the Constitution, and the Constitution's commerce clause. These constitutional provisions are held to add nothing to the plaintiff's cause of action. The mandate of "special efforts" imposed upon defendants by statute is a higher standard than
14
any which these constitutional provisions might require. Any protection which these constitutional provisions might provide are satisfied by RTA's Community Responsive Transit efforts for the elderly and handicapped as they are described in the pleadings, briefs, and affidavits filed with the court. Leary v. Crapsey, *supra*; Young v. Coleman, *supra*; United Handicapped Federation v. Andre, *supra*; Snowden v. Birmingham-Jefferson County Transit Authority, *supra*; Bohlke v. Golden Gate Bridge, Highway and Transportation District, *supra*.

13. The only mentions of the handicapped and elderly in these most recent bills require as a condition for mass transit grants that the grant recipient establish special fare structures for these groups (RTA is in compliance with these requirements). 90 Stat. 1171, 1186 (§315), 89 Stat. 695, 711 (§314). Thus the deletion of the broad language of the 1974 legislation in the 1975 and 1976 appropriations bills stemmed not from mere inadvertance but was a conscious decision on the part of a Congress which decided to deal with the problems of the handicapped and elderly in a less sweeping, more focused, manner.

14. Mr. Justice Brennan has written in a plurality opinion that physical disability is not a suspect classification for equal protection purposes. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (dictum).

ATTACHMENT C — *Vanko v. Finley*, No. C76-1305 (N.D.
Ohio, June 1, 1977).

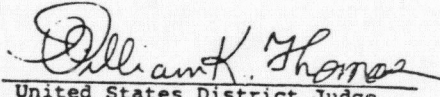
As the Supreme Court has said in another context:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill... Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

Lindsey v. Normet, 405 U.S. 56, 74 (1972). For the plaintiff to prevail he must, therefore, succeed on the statutory, rather than constitutional, bases of his complaint.

In accordance with the above opinion, decision on the defendants' motions is reserved pending further briefing and augmentation of the record.

IT IS SO ORDERED.


United States District Judge

ATTACHMENT D — Hudson Transit Lines, Inc. v. Brinegar,
Civil No. 74-648 (D. N.J., July 25, 1974).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

<u>HUDSON TRANSIT LINES, INC.,</u>	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CLAUDE S. BRINEGAR, SECRETARY OF THE	:	
DEPARTMENT OF TRANSPORTATION OF THE	:	
UNITED STATES, FRANK C. HERRINGER,	:	<u>OPINION</u>
ADMINISTRATOR OF THE URBAN MASS TRANS-	:	
PORTATION ADMINISTRATION OF THE UNITED	:	
STATES, ALAN SAGNER, COMMISSIONER OF	:	
TRANSPORTATION OF THE STATE OF NEW	:	
JERSEY, AND MAPLEWOOD EQUIPMENT	:	
COMPANY,	:	
	:	
<u>Defendants.</u>	:	

Newark, New Jersey
July 25, 1974

By: The Honorable LAWRENCE A. WHIPPLE, U.S.D.J.

- - -

The factual background of this action is well known to all the parties and need not be repeated in detail although certain facts deserve a general recitation. The plaintiff Hudson Transit Lines, Inc. (Hudson Transit) is a privately owned bus carrier that operates without state subsidy and pays state and federal income taxes. Hudson

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

2

Transit complains of the actions of Transport of New Jersey (T.N.J.) and the Commissioner of Transportation of New Jersey (New Jersey) which led to the creation of Maplewood Equipment Company (Maplewood).

In 1967 a New Jersey bus system, called the Inter City Group, which was in competition with Hudson Transit, became insolvent and was made a party to bankruptcy proceedings in the United States District Court of New Jersey. Subsequent negotiations between New Jersey and T.N.J. led to a plan in late 1971-72 whereby New Jersey purchased the buses of the Inter City Group and turned them over to T.N.J.'s subsidiary, Maplewood, for a nominal rental charge. This plan was ultimately approved by this District Court and has been in effect ever since.

In general terms, Hudson Transit contends the negotiations between New Jersey and T.N.J. violated the applicable New Jersey statutes (N.J.S.A. 52:34-6, 10; N.J.S.A. 27:1A-1 et seq.) or that the New Jersey statutes violated the New Jersey Constitution or the Fifth and Fourteenth Amendments to the United States Constitution and 49 U.S.C. Section 1601 et seq.; 15 U.S.C. Section 1 et seq. Although plaintiff seeks specific relief, this relief may be generally stated as an application to enjoin the continuing relationship between New Jersey and Maplewood.

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

The third count of the complaint charges inter alia that the Federal defendants, Secretary of the United States Department of Transportation Claude S. Brinegar (Brinegar) and the Administrator of the Urban Mass Transportation Administration Frank C. Herringer (Herringer) with accepting from the State of New Jersey a "so called preliminary application for federal funds to reimburse...New Jersey for a major portion of [New Jersey's] ...proposed...acquisition of the Inter City Group Bus Fleet." This application is alleged by plaintiff to be violative of the procedures required by 49 U.S.C. Section 1602 et seq. Therefore, the plaintiff seeks to have this Court order the Federal defendants to reject the preliminary application submitted by New Jersey. The authority to grant federal funds to the states in order to improve their mass transportation systems is contained in 49 U.S.C. Section 1601 et seq. This authority is vested in the Secretary of Transportation (Reorganization Plan No. 2 of 1968, 33 FR. 6965, 82 Stat. 1369) and has been delegated to the Urban Mass Transportation Administrator. Although 49 U.S.C. Section 1601 et seq. does not provide for review of the Secretary's actions, it is clear to this Court that it is empowered to review the final decisions of the Secretary. "There is no indication that Congress sought

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

to prohibit judicial review and there is no showing of clear and convincing evidence of a...legislative intent to restrict access to judicial review." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and see Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The parameters of judicial review are revealed in the Administrative Procedure Act (5 U.S.C. Section 701 et seq.) which reads in part: "A preliminary procedural or intermediate agency action or ruling not directly reviewable is subject to [judicial] review on the review of the final agency action." (5 U.S.C. Section 704).

However, as provided, such review must await the final decision of the Secretary. The rationale of this requirement is easily apparent. When, as in the instant matter, the Secretary's actions are discretionary and require a high degree of skill (see South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F. 2d 535 (7th Cir. 1969); Pullman, Inc. v. Volpe, 337 F. Supp. 432 (D.C. E.D. Pa. 1971), it is clear that, aside from political considerations, the Court does not have readily available to it the technical expertise it would require if it attempted to intervene prematurely.

Further: "[T]he administrative agency is created as a separate entity and invested with certain powers and

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

5

duties... [T]he exhaustion doctrine is therefore an expression of executive and administrative autonomy. The reason is particularly pertinent where the function of the agency...involve[s] exercise of discretionary powers granted the agency by Congress, or require application of special expertise." McKart v. United States, 395 U.S. 194 (1969).

In this matter, the Secretary has not made a determination as to New Jersey's preliminary application. The mere receipt of the preliminary application by the Secretary is not reviewable by this Court nor are the intra departmental discussions, relevant to this application, which must certainly be taking place with the Department of Transportation reviewable at this time. Therefore, since there has been no final decision as required by 5 U.S.C. Section 704, this Court presently lacks jurisdiction to grant the plaintiff the sought after relief. Therefore, the action as to the Federal defendants will be dismissed.

In addition to the prematurity of this cause of action, the jurisdiction of this Court is seriously questioned on other grounds. Plaintiff's allegations which are sufficiently related to prior ICC administrative proceedings as to warrant consideration of the appropriate-

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

ness of the procedural path followed by plaintiff herein. In fact, that background suggests that another procedural route should have been followed.

On June 1, 1973, the detailed opinion of the Interstate Commerce Commission's Administrative Law Judge, Joseph A. Reilly, approved Maplewood's application to operate bus lines, including the transfer of operating rights from the bankrupt companies to Maplewood (as more fully described in the bankruptcy reorganization plan). On February 11, 1974 Robert L. Oswald, Secretary of the Interstate Commerce Commission, issued a Decision and Order affirming Judge Reilly's facts, conclusions and findings. Hudson Transit's petition for reconsideration was denied by Secretary Oswald on April 25, 1974, and a further petition of Hudson Transit seeking a finding that an issue of general transportation importance was involved, was also denied.

During the ICC hearings, Hudson Transit presented its challenges to the efficacy and legality of many aspects of the bankruptcy reorganization plan including the lease arrangement attacked here. The ICC considered these arguments and fully evaluated the effect that the bankruptcy reorganization plan would have on Hudson Transit.

If plaintiff were permitted to proceed here and

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

7

to ultimately prevail on the merits, the practical and legal effect would be to enjoin the ICC order. Such a result, however, may only be obtained through the appropriate procedure as set forth in the Urgent Deficiency Act, 28 U.S.C. Section 2321-2325 (requiring the convening of a three-judge court and a prayer for an "injunction restraining the enforcement, operation or execution, in whole or in part, of any Order of the Interstate Commerce Commission...").

The appropriate procedure for Hudson Transit would be to attack the Interstate Commerce Commission's final order before a three-judge court. This is so even though Hudson Transit has not directly attacked the ICC's order. If the effect of a private suit would be to overrule an order of the ICC, then the ICC must be made a party to the action and the order must be properly appealed to a three-judge court. Vanner v. Michigan Central Railroad, 271 U.S. 127 (1926).

The case of B. F. Goodrich Co. v. Northwest Industries, Inc., 424 F. 2d 1349 (3rd Cir. 1970) certiorari denied 400 U.S. 822 (1970) concerned the issue of whether a corporation could institute a private action to enjoin an alleged violation of Section 5 of the Interstate Commerce Act in lieu of appealing pursuant to the Urgent

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

8

Deficiency Act. In the B. F. Goodrich Co. case, the Third Circuit stated that the District Court complaint seeking private enforcement of an ICC provision was "in substance a collateral attack on an order of the Commission and an attack on such an order may be brought only before a three-judge court convened pursuant to 28 U.S.C. Section 2325." B. F. Goodrich Co. v. Northwest Industries, Inc., supra, at 1352.

The case of Chemical Leaman Tank Lines, Inc. v. A. J. Weigand, Inc., 359 F. Supp. 1238 (D.C. Del. 1973) involved a private litigation wherein a competing trucking company sought to enjoin the conduct of A. J. Weigand, Inc. when that company was acting pursuant to an order of the Interstate Commerce Commission. The court stated at pp. 1242-1243:

"Moreover, this is a case where the Commission has taken final, affirmative action for the purpose of sanctioning particular conduct and a party adversely affected by that action seeks to overturn it. While the complaint does not directly ask for relief from a Commission order, the suit, in practical effect, constitutes a collateral attack on a Commission order...

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

"The statutory procedure for review is applicable although an order is not directly attacked-so long as the practical effect of a successful suit would contradict or countermand a Commission order."

A similar statement can be found in the case of Pacific Fruit Express Co. v. Akron, Canton & Youngstown Railroad Co., 355 F. Supp. 700, 708 (N.D. Calif. 1973) where the Court stated:

"Further collateral attack on a decision of the Interstate Commerce Commission is precluded by 28 U.S.C. Sec. 2321, which provides that any action to 'suspend, enjoin, annul, or set aside in whole or in part any order of the Interstate Commerce Commission...' must be brought pursuant to 28 U.S.C. Sects. 2321-25 which in turn prescribes that an injunction restraining the operation or execution of an ICC Order shall not be granted except by a three-judge federal court convened under 28 U.S.C. Sec. 2284.

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

10

No other type of suit attacking a
Commission decision directly or
indirectly, is permitted. [Emphasis
added.]

So, too, in this case, does the plaintiff seek to collaterally attack an order of the Interstate Commerce Commission. Such a back-door approach to administrative remedies cannot be countenanced.

Defendants, Alan Sagner, Commissioner of Transportation of the State of New Jersey (Sagner) and Maplewood Equipment Company (Maplewood) argue that Hudson Transit Lines, Inc. (Hudson Transit) has no "standing to challenge the procedures and agreements which led to the establishment of Maplewood as a New Jersey bus company."

Although this action is not brought as a taxpayer's suit against the United States and is therefore distinguishable from Flast v. Cohen, 392 U.S. 83 (1968), and its predecessor Frothingham v. Mellon, 262 U.S. 447 (1923), it is these two cases that form the bedrock upon which the Supreme Court's later pronouncements on the issue of standing have rested. In Frothingham the Court stated: "The party who invokes the [judicial] power must be able to show not only that the statute is invalid but

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

ii

that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." The Supreme Court in Flast spoke thusly: "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness...upon which the court so largely depends for the illumination of difficult constitutional questions."

In the instant action, the gravamen of the complaint revolves around Hudson Transit's contention it is suffering, and will suffer in the future financial injury due to the mere existence of Maplewood, and due to Maplewood's favorable economic position vis-a-vis Hudson Transit because of the favorable treatment it has received from the State of New Jersey.

The issue of standing when it is based on an alleged economic injury has seen great expansion in the last several years. The critical case is Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). In this case petitioners, which provided data processing services to business generally, challenged a ruling by the Comptroller of the Currency permitting

ATTACHMENT D - *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

14

national banks to make data processing services available to other banks and bank customers. In determining that the plaintiff has standing, the Court articulated a test to determine standing. "The question of standing... concerns...whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.... That interest, at times, may reflect aesthetic, conservation and recreational as well as economic values.... Certainly he who is likely to be financially injured...may be a reliable private attorney general to litigate the issues..."

The Court also stated, "Where statutes are concerned the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved persons is symptomatic of that trend..." *Id.* at pps. 153, 154. See also *Arnold Burs v. Camp*, 400 U. S. 45 (1970). Thus, standing revolves around petitioner's allegation of a personal stake in the outcome of the controversy. *Sierra Club v. Morton*, 405 U.S. 727 (1972) which may be shown by petitioner being arguably within the zone of interests, including economic interests, to be protected. See *Data Processing Service v. Camp*, *supra*.

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

13

It is clear to this Court that Hudson Transit's claim is arguable within the zone of interests to be protected. While Hudson Transit may not claim a right to be free from competition, it may certainly be interested in how its competitor carries on business. Here, Maplewood and Hudson Transit have direct lines of competition. Therefore, it is almost inevitable that a gain in ridership for one company will have an adverse economic effect on the other. If Maplewood is affecting Hudson Transit's business because of an advantage gained by dealing with the State of New Jersey it seems patently reasonable that Hudson Transit has an economic interest in insuring that those dealings were proper and legal. Otherwise, it would be possible for Hudson Transit's business to be completely destroyed without Hudson Transit having standing to object.

See also Merriam v. Kunzig, 476 F. 2d 1233 (3rd Cir. 1973) where the Court held that an unsuccessful bidder who was about to be deprived of a potentially valuable business relationship with the United States on account of an unlawful award to another, had standing to seek judicial review of the award.

I find that Hudson Transit has standing to bring this action against both the State of New Jersey and Maplewood.

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

14

Petitioners next contend this Court lacks jurisdiction to hear this action. Because of the ruling I shall make in this action, it is unnecessary to go into a detailed discussion of this Court's jurisdiction. Rather assuming arguendo, that this Court does have jurisdiction to hear this action and because the counts of this Complaint which are of exclusive federal jurisdiction, it is this Court's opinion, that as to the remaining counts of the Complaint, it should stay its hand and decline jurisdiction.

The doctrine of abstention first bloomed in Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). In Pullman, the State Railroad Commission had decreed that railroad sleeping cars were to be continuously in the charge of an employee "having the rank and position of a Pullman conductor." Because there were no black conductors, this regulation effectively precluded a black man from being in charge of a sleeping car. The regulation was attacked as being in violation of Texas law and the Fourteenth Amendment of the United States Constitution.

In deciding to permit the Texas Courts the first opportunity to pass on the regulation, Mr. Justice Frankfurter stated, "In the absence of any showing that these obvious methods [state courts] cannot be pursued

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

with full protection of the Constitutional claim, the District Court should exercise its wide discretion and stay its hand. Since Pullman, the Supreme Court has enunciated some of the criteria which should be used by the courts to determine whether they should abstain from exercising jurisdiction.

First, the Court should consider whether the "nub of the whole controversy" is state or local. If local, the Court will usually abstain. Reetz v. Bozanich, 397 U.S. 82 (1969). The proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state courts before a federal court considers the underlying Constitutional question. City of Meridan v. Southern Bell, 358 U.S. 639 (1959). The Court should abstain where it is possible that the state court's resolution may eliminate the constitutional issue and terminate the litigation. Baggett v. Bullitt, 377 U.S. 360 (1964). See also Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).

Turning to the instant action, it is clear that the New Jersey courts should have the first opportunity to determine this controversy. The nub of this controversy primarily concerns several New Jersey statutes including N.J.S.A. 52:34-6; N.J.S.A. 27:121 et seq.; N.J.S.A.

ATTACHMENT D — *Hudson Transit Lines, Inc. v. Brinegar*,
Civil No. 74-648 (D. N.J., July 25, 1974).

16

52:34-10(c).

The determination of those issues which involve among other things, notice as required by the New Jersey Constitution, the requirements that all New Jersey State contracts should be open to public bidding, the defining of what is a "donation" under the New Jersey Constitution are all issues that the New Jersey Courts are peculiarly suited to adjudicate. New Jersey Courts are certainly well qualified to settle New Jersey questions of statutory interpretation and the resulting adjudications may well be dispositive of the instant action while at the same time eliminating the Constitutional issues. Because of my view, that justice is best served by this Court declining to exercise jurisdiction, this action as to Commissioner Sagner (State of New Jersey) and Maplewood is dismissed.

In the light of this Court's decision, the deposition question is mooted, as well as all other pending matters in the cause.

So ordered.

LAWRENCE A. WHIPPLE, U.S.D.J.

ATTACHMENT E -- David D. Hudson v. Washington Metropolitan Area Transit Authority, Civil Action 76-0360
(D.D.C., July 8, 1976).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID D. HUDSON, :
 :
Plaintiff, :
 :
v. : Civil Action 76-0360
WASHINGTON METROPOLITAN AREA :
TRANSIT AUTHORITY and :
WILLIAM T. COLEMAN, JR., :
SECRETARY OF TRANSPORTATION, :
 :
Defendants. :

FILED

JUL 8 1976

JAMES F. CAVEY, Clerk

MEMORANDUM OPINION

Plaintiff, David D. Hudson, has brought this civil action against the Washington Metropolitan Area Transit Authority ("WMATA") and William T. Coleman, Jr., Secretary of Transportation, ("DOT"), seeking preliminary and permanent injunctive relief to prevent DOT from making an urban mass transportation capital improvement grant to WMATA, and to prohibit WMATA from receiving or applying such a grant in the manner described in its Grant Application for Urban Mass Transportation Capital Assistance Project No. IT-03-0029 unless and until a public hearing pursuant to "adequate prior notice" has been held. Defendants have moved to dismiss or in the alternative for summary judgment. The following material facts are not in dispute.

Plaintiff alleges that in 1975, WMATA applied to DOT for an urban mass transportation capital assistance grant in the amount of \$18,266,366 to assist it in financing a program of improvements including the purchase of new buses, the purchase and installation of bus shelters, and the construction of three bus maintenance facilities (Complaint, para. 7). He also alleges that a public hearing on that application was held on December 9, 1975, but that adequate prior notice was not given in the manner required by law, alleging that provisions of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1601 et seq.) (hereinafter referred to as "the Act") and the Washington Metropolitan Area Transit Authority Compact to which Congress has given its consent (Pub.L. 89-744,

ATTACHMENT E — *David D. Hudson v. Washington Metropolitan Area Transit Authority*, Civil Action 76-0360 (D.D.C., July 8, 1976).

- 2 -

November 6, 1966, 80 Stat. 1324) ("the Compact") specify that notice of every hearing must include the posting thereof in all vehicles and rolling stock in revenue service.

The Federal defendant acknowledges that DOT has received and is presently considering WMATA's application for a capital assistance grant for the Project; it acknowledges that a hearing with respect to the Project was held on December 9, 1975, pursuant to DOT requirements set forth in section 3(d) of the Act (49 U.S.C. § 1602(d)) and DOT's administrative regulations thereunder; and it acknowledges that it is possible that notice of said hearing was not posted in all WMATA buses in revenue service 30 days prior to the date of said hearing. WMATA joins in this concession, but adds that said notices were posted in some buses.

Plaintiff alleges that he was first apprised of the hearing on December 6, 1975, by a notice posted in a WMATA transit bus (Complaint, para. 9) and that he attended the hearing held on December 9. The transcript of the hearing shows that plaintiff testified extensively with respect to the project and the proposed grant (*Id.*, at pages 19-23).

The Urban Mass Transportation Act requires that an applicant for a grant loan "afford an adequate opportunity for public hearings pursuant to adequate prior notice." 49 U.S.C. § 1602(d)(1). This subsection prescribes the minimum for "adequate prior notice" as publication of notice "in a newspaper of general circulation in the geographic area to be served." DOT, in its External Operating Manual, Chapter IIB, has further defined "adequate prior notice" in setting forth the administrative requirements for a public hearing:

ATTACHMENT E — *David D. Hudson v. Washington Metropolitan Area Transit Authority*, Civil Action 76-0360 (D.D.C., July 8, 1976).

- 3 -

"The applicant, or designated public agency, shall publish notice of intent to hold the public hearing in newspapers of general circulation in the locality, including newspapers oriented to the minority community. This notice shall be advertised at least twice, with the first advertisement occurring not less than 30 days before the date of the hearing."

There is no question but that these requirements were met.^{1/} Plaintiff, however, asserts that "adequate prior notice" was not given because notices were not posted in all of WMATA's vehicles and rolling stock, citing Section 62(c)^{2/} of the WMATA Compact.

First, the notice requirements of section 62(c) of the WMATA Compact only apply to action of the Board of WMATA when considering the change of a fare or a rate, or establishing or abandoning any service. Section 62(a).^{3/} Since the hearing in question concerned an application for a grant loan, the express notice requirements of the statute would not apply. But plaintiff asserts that WMATA has applied this notice requirement to all hearings, not just those enumerated in section 62(a), and therefore should be bound by this practice. No support is offered for this proposition, nor is it pleaded in the complaint. Even if WMATA has provided such notice with respect to other hearings, as a matter of law, no such notice would be required as to the hearing conducted pursuant to 49 U.S.C. § 1602 and the applicable federal regulations.

1/ Exhibit "J" to the Grant Application for the Project, entitled "Public Hearing" contains copies of the published notices as they appeared in three newspapers of general circulation in the Washington metropolitan area. Certifications attached thereto state that notices describing the Project were published in The Washington Star on November 8 and 15, 1975; in The Washington Afro-American on November 15 and 22, 1975; and in The Washington Post on November 10 and 17, 1975; for a total of six appearances within the 30 days prior to the date of the hearing, the first occurring not less than thirty (30) days before the date of the hearing.

2/ Section 62(c) provides that:
"The Board shall give at least thirty days' notice for all hearings. The notice shall be given by publication in a newspaper of daily circulation throughout the zone and such notice shall be published once a week for two successive weeks. The notice shall start with the day of first publication. In addition, the Board shall post notices of the hearing in its offices, all stations and terminals, and in all of its vehicles and rolling stock in revenue service."

3/ Section 62(a) provides that:
(Continued on following page).

ATTACHMENT E — *David D. Hudson v. Washington Metropolitan Area Transit Authority*, Civil Action 76-0360
(D.D.C., July 8, 1976).

- 4 -

What is "adequate prior notice" has been defined in the statute and the regulations relating to public hearings on an application for a grant loan under the Urban Mass Transportation Assistance Act. The notice requirements of Section 62(c) of the WMATA Compact, even extended beyond their statutory limits, cannot be as a matter of law imposed upon the federal scheme. No authority exists to broaden the Section 1602(d)(1) notice to include the requirement that notices be posted on the vehicles and other rolling stock of the applicant.^{4/} Since no such requirement can be imposed upon the defendants as a matter of law, the complaint fails to state a claim upon which relief can be granted.

Additionally, the Court notes that no final decision has been reached on the application for a grant loan to WMATA. Absent such a decision, the action of the agency cannot be said to be "final" and thus not reviewable. 5 U.S.C. § 704. Plaintiff's assertion that the "final" agency action in this case is the refusal to issue "proper" notice and hold a new hearing is not persuasive since denial of the grant would make this issue moot.

An order in accordance with the foregoing will be issued of even date herewith.

Date: July 8, 1976

Charles R. Richey
Charles R. Richey
United States District Judge

(Continued from preceding page)

"The Board shall not make or change any fare or rate, nor establish or abandon any service except after holding a public hearing with respect thereto. . . ."

4/ Plaintiff's assertion that defendant Coleman cannot limit the notice requirements of the Compact misstates the issue presented, since those requirements cannot be found to apply as a matter of law. In this regard, it is notable and needs no citation to authority to recognize the established principle that the more specific statute controls, in this case 49 U.S.C. § 1602(d)(1).

ATTACHMENT E — *David D. Hudson v. Washington Metropolitan Area Transit Authority*, Civil Action 76-0360
(D.D.C., July 8, 1976).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID D. HUDSON,	:
	:
Plaintiff,	:
	:
v.	: Civil Action 76-0360
WASHINGTON METROPOLITAN AREA	:
TRANSIT AUTHORITY and WILLIAM	:
T. COLEMAN, JR.,	:
SECRETARY OF TRANSPORTATION,	:
	:
Defendant.	:

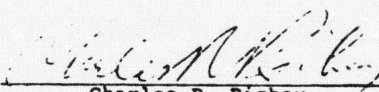
FILED
JUL 8 1976

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the Court's Memorandum Opinion issued of even date herewith, and pursuant to Local Rule 1-9(f), it is, by the Court, this 9th day of July, 1976,

ORDERED, that the defendants' motions to dismiss be, and the same hereby are, granted, and the complaint in Civil Action 76-0360 be, and the same hereby is, dismissed.


Charles R. Richey
United States District Judge

ATTACHMENT F - Snowden v. Birmingham-Jefferson County
Transit Authority, Civil Action No. CA-75-G-0330-S (N.D.
Ala., April 7, 1975).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

JANE SNOWDEN, individually,)
and on behalf of all others,)
the same or similarly)
situated)

v.)

BIRMINGHAM-JEFFERSON COUNTY)
TRANSIT AUTHORITY, a public)
corporation and WILLIAM T.)
COLEMAN, JR., in his official)
capacity as Secretary of)
Transportation)

CIVIL ACTION NO. CA75G0330S

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

APR 7 - 1975

WILLIAM E. DAVIS
CLERK, U. S. DISTRICT COURT
BY: DEPUTY CLERK

ORDER

This action came to be heard on April 1, 1975, upon motion for preliminary injunction and motion for temporary restraining order filed in this court on March 21, 1975, by the plaintiff in the above-styled action.

The Court has considered the affidavits, oral testimony, and briefs and arguments of counsel and finds as follows:

1. The plaintiff has failed to show that she will suffer irreparable injury unless granted the extraordinary relief which she seeks. The defendant, Birmingham-Jefferson County Transit Authority, is not in the process of effecting changes in the transportation services currently provided in this area which are to the detriment of the plaintiff. The evidence shows that the defendant, Birmingham-Jefferson County Transit Authority, is in the process of entering into

ATTACHMENT F — *Snowden v. Birmingham-Jefferson County Transit Authority*, Civil Action No. CA-75-G-0330-S (N.D. Ala., April 7, 1975).

-2-

a relationship with an independent non-profit agency for the purpose of making changes in the current transportation system for the benefit of the plaintiff and others similarly situated.

2. Any injury that might be suffered by the plaintiff in the absence of the preliminary relief prayed for is outweighed by the injury to the public interest that would result in the granting of such preliminary relief. Such preliminary relief would impair the capability of the defendant, Birmingham-Jefferson County Transit Authority, to accomplish its purpose of providing adequate, reasonably priced transportation to the general public and would adversely affect the policies established by the Secretary of Transportation regarding urban mass transit. The plaintiff has made no showing of any injury which would justify this Court in granting preliminary relief which would, by its nature, be detrimental to the public interest.

3. The evidence produced at the hearing showed that a public hearing was held after adequate notice on the subject of the purchase of the transit buses which the plaintiff seeks to enjoin. The plaintiff was, at that time, a resident of the City of Birmingham and, after adequate notice by publication, failed to attend the public hearing or make objection to the purchase which she now seeks to enjoin. The defendant, Birmingham-Jefferson County Transit Authority, expects delivery of the buses purchased beginning the end of April, 1975.

ATTACHMENT F — *Snowden v. Birmingham-Jefferson County
Transit Authority*, Civil Action No. CA-75-G-0330-S (N.D.
Ala., April 7, 1975).

-3-

Thus, plaintiff's complaint and motions for preliminary relief were not timely filed, and such relief is barred by the plaintiff's delay.

4. The plaintiff seeks to enjoin the defendant, Birmingham-Jefferson County Transit Authority, from taking delivery of twenty-two transit buses currently on order from AM General Corporation unless it attempts to renegotiate the contract with AM General Corporation to provide for devices for boarding and securing wheelchairs. However, expert testimony for the plaintiff indicated that no such devices are currently being produced by bus manufacturers. The modification of a regular transit bus to accommodate such a device made by another manufacturer costs approximately \$12,000 per bus, making the total expenditure that would be required for twenty-two buses approximately \$264,000. Further testimony for the defendants indicated that funding for such a project is unavailable. In addition, a transit bus so modified would have to be subjected to structural redesign and testing which would incur further expense. In any event, the majority of the funding for the purchase of these buses is provided by the Urban Mass Transportation Administration, and no regular transit bus modified to board and secure wheelchairs has been approved for purchase by that agency.

5. The preliminary relief sought by the plaintiff necessarily calls for the modification of a contractual relationship between the defendant, Birmingham-Jefferson County Transit Authority, and the manufacturer of twenty-two transit

ATTACHMENT F — *Snowden v. Birmingham-Jefferson County Transit Authority*, Civil Action No. CA-75-G-0330-S (N.D. Ala., April 7, 1975).

-4-

buses purchased by that defendant. However, the plaintiff has failed to join the manufacturer as a party to this action, and this Court, in equity and good conscience, cannot grant the relief sought in the absence of the manufacturer since that entity is regarded by this Court as indispensable to this proceeding.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The motion for temporary restraining order filed on March 21, 1975, by the plaintiff in the above-styled action is hereby overruled.
2. The motion for preliminary injunction filed on March 21, 1975, and amended April 2, 1975, by the plaintiff in the above-styled action is hereby overruled.
3. Defendants' motions for summary judgment will be heard on April 11, 1975, at 2:15 P.M.

DONE and ORDERED this 7th day of April, 1975.

J. FOY GUNTER, JR.
United States District Judge
For the Northern District of
Alabama

cc. Don B. Long, Jr.
1212 Bank for Savings Building
Birmingham, Alabama 35203

Bill L. Barnett
Assistant United States Attorney
Federal Building
Birmingham, Alabama 35203

ATTACHMENT F — *Snowden v. Birmingham-Jefferson County
Transit Authority*, Civil Action No. CA-75-G-0330-S (N.D.
Ala., April 7, 1975).

-5-

Cleveland Thornton
Legal Aid Society of Birmingham
713 18th Street North
Birmingham, Alabama 35203

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

The Daily Record

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

August 23, 1977

Re: Donna Leary, et. al. vs. Hetty Jean Crapsey, et. al.

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Richard Arcara, Esq.
Gerald Houlihan, Of Counsel
Attorney(s) for

Appellee

On August 23, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Monroe County Legal Assistance Corp.
80 West Main Street
Rochester, New York 14614

Harris, Beach, Wilcox, Rubin & Levey
2 State Street
Rochester, New York 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

Sworn to before me this 23rd day of August 1977

Kathleen S. King
Notary Public

~~Commissioner of Dads~~